Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

CONSTANTINE ECONOMOU, Petitioner,

v.

THOMAS E. WHITE, Secretary
Of the United States Department of the Army
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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138 pp

QUESTIONS PRESENTED

Under The Age Discrimination in Employment Act ("ADEA") 29 U.S.C. §§ 621 et seq, Title VII 42 U.S.C. §§ 2000e et seq, and the Rehabilitation Act of 1973 as amended, 29 U.S.C. §§ 701-794 should the government be in conflict with itself in the interpretation of Exhaustion of Administrative Remedies and in the process harm the petitioner by violating Petitioner's Seventh Amendment rights?

PARTIES

The parties to this action are set forth in this caption

Constantine Economou Petitioner
Pro-Se

-against-

Louis Caldera, Jr. Secretary of the
United States Department of the Army
Respondent

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Petitioner Constantine Economou respectfully prays that this Court grant a writ of certiorari to review the judgment and opinion for the Second Circuit regarding exhaustion of administrative remedies entered on April 5, 2002.

OPINIONS BELOW

The April 5, 2002 opinion of the court of appeals, for the Second Circuit which, is set out at pp. 1a of the Appendix.

JURISDICTION

The decision of the court of appeals was entered on April 5, 2002. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254.

STATUS INVOLVED

Age discrimination in Employment Act, 29 U.S.C. § 621 et seq. ("ADEA") Title VII of the Civil Rights Act of 1964; 42 U.S.C § 2000e et seq., and the Rehabilitation Act, 29 U.S.C. §§ 701-794.

STATEMENT OF CASE

The Petitioner, a United States Veteran, was sixty-nine years old when he was fired from the U.S. Army Corps of Engineers in 1997, on alleged pretextural charges. The Petitioner had completed twenty-nine years of exemplary service with the government when he was fired. Petitioner had earned an exceptional performance work rating, one for each year of service prior to his firing, with the exception of 1996-1997 when the Petitioner was denied a performance rating on alleged discriminatory grounds. On August 23, 1997 Colonel (Col) Gary Thomas, the Commander of the US Army Corps of Engineers and the immediate supervisor of the Petitioner and the main actor in this complaint, issued a letter of Removal to the Petitioner based on pretextural charges. The Petitioner was immediately removed from his lawful position[1] as Chief of the Construction Division, a position he had held from November 5, 1992. The Petitioner was removed by the Respondent in the afternoon of August 26, 1997 and placed in austere isolation in a non-existing, non-supervising position in the Planning Division where he was kept for 110 days until December 19, 1997 when his removal from service became final. It should be noted, the Petitioner was removed form his position by the Respondent without any formal paperwork. It is customary to use form SF-52 for all actions within the U.S. Service. Because the Petitioner was removed from his official position for over 30 days and because the decision maker, Col. Thomas, eliminated all of the Petitioner's official duties, the removal constituted a Reduction In Force action (RIF). The lower Court and the Second Circuit erred in not considering this point. Thus the Petitioner was harmed in two ways. One, he was not allowed to receive a performance monetary award given to similarly situated division chiefs in the sum of $2,000.00 dollars. Second, the Petitioner was humiliated in

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[1] The Petitioner was grade GM-15 at the time of the transferal to a new position grade GS-11. This transferal constitutes removal from the Petitioner's permanent lawful position.

$2,000.00 dollars. Second, the Petitioner was humiliated in the eyes of the N.Y. District without due process as a means of retaliation.

On October 4, 1997, the Petitioner filed a formal complaint with the EEOC (1a) regarding the proposed removal from service. On December 19, 1997, Col. Gary Thomas removed the Petitioner from Service. On January 7, 1998, the Petitioner telephoned Joanne Close EEO officer and informed her that he wished to amend his October 4, 1997 formal EEO complaint to include the removal since the two complaints where one and the same and should be consolidated into one complaint. The Petitioner Constantine Economou commences this action to the Supreme Court (Court) on Certiorari to review a Second Circuit judgment affirming the lower courts finding decision dismissing Petitioner's complaints, summary judgment on Age discrimination, denial of performance rating for failure to exhaust administrative remedies.

In the beginning of 1997, petitioner was 69 years old when he was subjected to severe and ongoing illegal discriminating activity by the Agency, the U.S. Army Corps of Engineers New York District. Believing he had been retaliated against due to his previous Equal Employment Opportunity (EEO) activity and due to his age, he filed on Age discrimination formal complaint claim on March 5, 1998 removal from Federal Service, shortly after he had prevailed in an EEOC action. Petitioner initiated a discrimination complaint on the proposed removal.

On December 19, 1997, the Petitioner received a notice of removal. On January 8, 1998, Petitioner initiated a precomplaint action with a counselor on the actual removal hoping the proposed removal claim and the actual removal claim would be consolidated, believing the two complaints where one and the same. When the Petitioner was given his removal papers he was also provided with a note which, synopsized, said he could appeal this action via Merit Systems Protection Board (MSPB) and if he thought that it was discrimination to call the EEO officer. The Petitioner

The EEO officer failed to advice the Petitioner of the perils of filing with MSPB, and in fact advised petitioner to file with the MSPB.

REASONS FOR GRANTING THE WRIT

I. THE SECOND CIRCUIT'S INTERPRETATION OF EXHAUSTION OF ADMINISTRATIVE REMEDIES IN AGE DISCRIMINATION CONFLICT WITH EEOC AND 29 U.S.C. § 633a (b) AND HARMS THE PETITIONER'S SEVENTH AMENDMENT RIGHTS.

On March 2, 1998, the Petitioner filed a formal EEOC complaint on age discrimination [12A-15A]. The Petitioner's age discrimination claim is distinguishable in that it is not part of the January 14, 1998 MSPB claim which involves retaliation[2] only. Evidence of this is provided in [34a-38a]. The Age discrimination EEOC formal complaint was properly invoked via EEOC, a fact undisputed by the respondent, in strict compliance with 29 U.S.C. § 633a (b). The Petitioner had submitted a valid claim in age discrimination[3]. The Petitioner has established that he was a member of a protected group. He was 69 years old at the time of the alleged discrimination, and highly qualified to do his job as a division chief. The petitioner was separated from his lawful position as chief of the Construction

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[2] See evidence of retaliation only in the MSPB Claim p36a item 27.

> "b. Aggrieved May Bypass Administrative Process
> An aggrieved person may bypass the administrative complaint process file a civil action directly in U.S. District Court provided that the aggrieved person first provides the Commission with a written notice of intent to sue under the ADEA. The notice to the Commission must be filed in 180 days of the date of the alleged discriminatory action. Once a timely notice of intent to sue is filed with the Commission, the aggrieved person must wait at least thirty (30) days before filing a civil action."

[3] The formal Age complaint DA FORM 2590-R is dated March 5, 1998. Item 13, indicates age discrimination. The Age claim is also evident in the discrimination action claim before the United States District Court Southern District New York pp28a-33a COUNT II item 21.

Division from August 26, 1997 to December 19, 1997 the day he was fired from federal service by the main actor of this complaint, Col. Thomas.

On August 23, 1997 Col. Thomas, the Commander of the U.S. Army Corps of Engineers and the immediate supervisor of the Petitioner, issued a letter of Removal to the Petitioner based on pretextural charges. The Petitioner was immediately removed from his lawful position as Chief of the Construction Division, a position he had held from November 5, 1992. The Petitioner was removed by the Respondent in the afternoon of August 26, 1997 and placed in austere isolation in a non-existing, non-supervising position in the Planning Division where he was kept for 110 days until December 19, 1997 when he was removed from service by the Respondent. It should be noted, the Petitioner was removed from his position by the Respondent, without any formal paperwork. It is customary to use form 52 for all actions within the U.S. Service. Because the Appellant was removed from his official position for over 30 days and because the decision maker, Col. Thomas, eliminated all of the Petitioner's official duties, the removal constituted a Reduction in Force Action (RIF). The lower and Second Circuit Court erred in not considering this point.

On April 5, 2002 the Second Circuit affirmed the Southern District Summary Judgment for "failure to exhaust his administrative remedies"[4] The Second Circuit Court is in

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[4] See 13. It is undisputed that Petitioner met his burden in exhausting administrative remedies, in his age discrimination. The lower court affirmed by the Second Circuit, is in conflict with itself when it attached Age discrimination to MSPB claim, even though the record shows that the Petitioner had no Age claim with the MSPB. In order to justify it's inclusion as a claim that had not exhausted its Administrative remedies.

EEOC pursuant to 29 C.F.R. § 1614.201 states:

> "An aggrieved person may file an administrative age discrimination complaint with the agency pursuant to 29 C.F.R. Part 1614. If the aggrieved person elects to file an administrative complaint, s/he must exhaust...

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conflict with the EEOC determination that Petitioner had fulfilled his exhaustion of administrative remedies, in full compliance with 29 C.F.R. § 1614.302 (b). The Second Circuit erred in agreeing with the lower court in attaching the age discrimination claim de novo to MSPB claim instead of rejecting the inclusion on grounds of re judicata. By denying the Petitioner trial by jury on his age discrimination claim, via exhaustion of administrative remedies, the Second Circuit is in conflict with 29 C.F.R. § 1614.302 (b), 29 C.F.R. § 1614.201, and has violated the Petitioner's Seventh Amendment Rights which
entitles the Petitioner to jury trial. Similarly, in Curtis v. Loether U.S. 189, 196, n. 11, 94 S.Ct. 1005, 1009, n. 11,39 L.Ed.2d 260 *546 the jury would have been required to resolve the claims before the Judges ruling, Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 510-511, 79 S.Ct. 948, 956-957, 3 L.Ed.2d 988; Dairy Queen, Inc. v. Wood 369 U.S. 469, 473, 82_S.Ct. 894, 897, 8 L.Ed.2d 44. In Parklane Hosiery Co. v. Shore, 439 U.S. 322, 99 S.Ct. 645, 58 L.Ed.2d 552.

Similarly, when legal claims are joined on the same action, on issues common to both Justice Brennan, J., observed that "the right to jury trial on legal claims, including all issues common to both claims remain intact". Curtis v. Loether U.S. 189, 196, n. 11, 94 S.Ct. 1005, 1009, n. 11,39 L.Ed.2d 240 (1974).

In conclusion, the Petitioner's age discrimination claim is consistent with this Court's past decisions regarding lower

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...administrative remedies before s/he may file a civil action in U.S. District Court. Exhaustion of administrative remedies occurs when the agency takes final action or 180 days after filing the complaint if no final action is taken. See § 1614.201; see also Chapter 9, Sections II and III, of this Management Directive."

Petitioner was within the meaning of the above EEOC Age discrimination direction in pursuing his claim.

court wrongful denials of Seventh Amendment infractions as in Meeker v. Ambassador Oil Corp., 375 U.S. 160, 84 S.Ct. 273, 11 L.Ed.2d 261 (1963) (per curiam) Tull v. United States, 481 U.S. 412, 107 S.Ct. 1831, 95 L.Ed.2d 365 (1987). The above cases were remanded by this Court for trial before a jury. Petitioner hopes and prays the Court will arrive in the same determination, reverse the summary judgment and remand the age discrimination claim for trial before a jury.

II. ARE CLEAR AND UNAMBIGUOUS INSTRUCTIONS REQUIRED FROM AGENCIES WHEN ADVISING PETITIONER'S ON THEIR RIGHTS? SHOULD WARNINGS BE GIVEN?

When the Petitioner was fired from government service on December 19, 1997, he was provided with a note from the EEO officer at the New York District Corps of Engineers. The note stated:

> "You may appeal under statutory appellate procedures by filing a notice of appeal... to the Merit Systems Protection Board. If you appeal, the Merit Systems Protection Board will review the decision and all findings in connection to the removal.... If you believe this action discriminatory, ... you have the right to seek assistance from the EEO."

In accordance with the above note[5], the Petitioner visited the EEO officer at North Atlantic Division Corps of Engineers and requested guidance from Joanne Close. Close indicated that she was very familiar with the note and advised the Petitioner to file with MSPB and provided him with MSPB forms. Close also advised the Petitioner that his request for amending the formal EEOC claim of the actual separation from service should be through a counsel for counseling. Eventually, Close requested the assistance of

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[5] The note calls for assistance from the EEO. This note is in conflict with 29 C.F.R. § 1614.102 and MD 110 Chapter 1 par III which states:

"Agencies must avoid conflicts of position or conflicts of interest as well as the appearance of such conflicts. For example, the same agency official(s) responsible for executing and advising on personnel actions may not also be responsible for managing, advising, or overseeing the EEO pre-complaint or complaint processes. Those processes often challenge the motivations and impacts of personnel actions and decisions. In order to maintain the integrity of the EEO investigative and decision making processes, those functions must be kept separate from the personnel function."

Major-General Sinn Commander NAD to order Cathleen A. Carpenter EEO Manager[6] Philadelphia District Corps of Engineers, one of the districts under the command of NAD, to serve as the counselor for the Petitioner and assured the Petitioner that she was going to verify the above with Washington and if need be the Petitioner could withdraw his MSPB claim. The EEO officer Close misadvised the Petitioner who had followed her guidance and advice[7] The petitioner had followed the EEO officer's advise and on January 14, 1998 filed a claim with the MSPB. The Agency's note to the Petitioner along with the advice of Close, misinformed, mislead and entrapped the Petitioner, in violation of 29 U.S.C. 1614.302 Mixed case complaint (b) which states:

> "(b) Election. An aggrieved person may initially file a mixed case complaint with an agency pursuant to this part or an appeal on the same matter with the MSPB pursuant to 5 CFR 1201.151, but not both. An agency shall inform every employee who is the subject of an action that is appealable to the MSPB and who has either orally or in writing raised the issue of discrimination

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[6] Assigning a EEO manager to serve as an EEO Counselor is in conflict and in violation of 29 C.F.R. § 1614.605 (c) and MD 110 Chapter 1 VI which states:
" VI. EEO OFFICIALS CANNOT SERVE AS REPRESENTATIVES
EEO officials must have the confidence of the agency and its employees. It is inconsistent with their neutral roles for EEO counselors, EEO investigators, EEO officers, and EEO program managers to serve as representatives for agencies or complainants. See 29 C.F.R. § 1614.605(c) (disqualification of representatives for conflict of duties)."

[7] Close is confused, and on February 5, 1998 she telephoned Joseph Cohen at EEOCCRA and records her conversation on a memorandum for record, which states under paragraph b "The necessity of counseling the complainant on his avenue of redress and verifying jurisdiction requires a clear answer" (39A) This MFR is part of the investigation file submitted to EEOC by the Agency.

during the processing of the action of the right to file either a mixed case complaint with the agency or to file a mixed case appeal with the MSPB. The person shall be advised that he or she may not initially file both a mixed case and an appeal on the same matter and that whichever is filed first shall e considered an election to proceed in that forum. If a person files a mixed case appeal with the MSPB instead of a mixed case complaint and the MSPB dismisses the appeal for jurisdictional reasons, the agency shall promptly notify the individual in writing of the right to contact an EEO counselor within 45 days of receipt of this notice and to file an EEO complaint, subject to Sec. 1614.107. The date on which the person filed his or her appeal with MSPB shall be deemed to be the date of initial contact with the counselor. If a person files a timely appeal with MSPB shall be deemed to be the date of initial contact with the counselor. If a person files a timely appeal with MSPB from the agency's processing of a mixed case complaint and the MSPB dismisses it for jurisdictional reasons, the agency shall reissue a notice under Sec. 1614.108(f) giving the individual the right to elect between a hearing before an administrative judge and an immediate final decision."

It is overt that the government is in conflict with itself when the agency violates 29 U.S.C. 1614.108(f) as shown above and shows that the decision to change the language of the note given to Petitioner was improperly motivated.[8] It is

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[8] Affirmative misconduct has occurred by the Agency/Respondent where respondent has provided an inadequate and manipulated notice to the petitioner. Thus a notice intended by Congress to inform and forewarn government employees regarding procedures in the selection of an avenue of redress in discrimination cases has been manipulated and transformed by the

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also overt that twenty two days after the Petitioner had been promised to get back to him with an opinion on filing both with EEOC and MSPB the advisor to the Petitioner, Close, still did not know what to tell the Petitioner regarding the said note.

The Second Circuit in agreeing with the lower court wrote: "Even absent an explicit statement of the "either or" nature of the initial filing process, therefore, Economou, and his counsel, had ample opportunity to review the relevant guidelines before withdrawing the MSPB appeal three months after its filing. This Court thus finds Economou's assertion that the Notice of Decision was misleading without merit."[9]

The Petitioner has testified under oath that during the period, from December 1997 to April 1998 the Petitioner had no access to his attorney due to the fact Serrins[10], the attorney in question, had been unavailable due to heavy commitments to other cases. Thus for the period indicated above the Petitioner never spoke with Serrins on the subject. Other than the EEO officer Close and the note the New York district gave the Petitioner during his firing, the Petitioner received no advice from any other person or source.

These facts were made known to the Second Circuit. It is, therefore hard to imagine that the Petitioner would

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Agency respondent from a Salutary protection into a trap for the unwary. On an analogous example, would it be unlawful to remove the words dangerous to your health from the Cigarette's warning? Or remove the speed lines from traffic signs and hold motorists responsible because they should have had legal advice?

[9] Footnote 3 of page 5 of (5a)

[10] The Petitioner did not have an open contract with Serrins. Because of limited resources, the Petitioner would negotiate with Serrins each service needed.

knowingly allow himself to be in the unenviable situation of entrapment. Further, the subject of knowledge of the law and procedures should have been a case for the jury to decided in that it involves credibility and veracity to be decided before a jury with the help of witnesses such as Close and Serrins. The Second Circuit did not follow the teachings of the Federal rule Civ.P. 56 (c) which states that evidence in the light most favorable to the nonmovant.

In accordance with Appendix B EEO-MD-110 part V[11] The Agency combined the Proposed removal EEOC complaint with the Actual removal EEOC complaint. EEOC New York District did not consider the claim invalid, nor did the Agency raise any objections nor did the agency appeal to EEOC.

EEOC established that the Petitioners formal complaint on the actual removal were valid EEO claims thus EEOC did not dismiss them as it was required to do under 29 C.F.R. § 1614.302 (b). Here again the agency is in conflict with itself. The Second Circuit in relying in the lower courts findings reintroduced the exhaustion of administrative remedies issue, and allowed the Agency to change position after failing to challenge the EEOC determination that the

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[11] EEO-MD-110 Part V states:

> "v. That the agency must consolidate two or more complaints filed by the same complainant after appropriate notice to the complainant. 29 C.F.R. § 1614.606. The EEO Counselor should advise the complainant that when a complaint has been consolidated with one or more earlier complaints, the agency shall complete its investigation within the earlier of 180 days after the filing of the last complaint or 360 days of the filing of the first complaint and that the complaint may request a hearing before an EEOC Administrative Judge at any time after 180 days of the filing of the first complaint."

Petitioner had exhausted his administrative remedies. No such rights were extended to the Petitioner.

III. SHOULD PRETEXT BE DECIDED BY JURY?

Petitioner was treated differently as compared to similarly situated employees when his supervisor Col. Thomas denied Petitioner's 1996-1997 performance rating and the corresponding award and salary raise that would have resulted from a positive evaluation. The Petitioner alleges that Col. Thomas, his immediate supervisor, and Commander of the New York District Corps of Engineers, denied Petitioner's performance rating as a means of retaliation for having engaged previously in Title VII protected EEO activity. Petitioner was the only Division Chief-level supervisor who was denied a performance rating when compared to other similarly situated supervisors who worked under the same supervisor, Col. Thomas, and had the same performance standards. The 10th Circuit has established that pretext can be shown by a comparison of the Petitioner's treatment with the treatment of similarly situated, non-protected employees, the court noted. The court decided that "An employee is similarly situated to the Petitioner if the employee deals with the same supervisor and is subject to the same standards governing performance and discipline," Aramburu v. Boeing Co., 112 F. 3d 1398, 77 FEP Cases 238 (10th Cir 1997).

In affirming the Petitioner's summary judgment, the Second Circuit must resolve and draw all reasonable inference in favor of the Petitioner. The Second Circuit reversed the teachings of the Supreme Court and drew all reasonable inferences in favor of the movant. The Petitioner has presented sufficient evidence to defeat summary judgment. Specifically: Petitioner has shown that the main actor of this retaliation Col. Thomas, has asserted reasons for denying the Petitioner a performance evaluation which are pretextural and untrue. The Supreme Court in Reeves v. Anderson Plumbing, 120 S.Ct. 2097, 147 L. ED.2d 105, affirmed it's earlier ruling in St. Mary's Honor Center v. Hicks, 509 U.S. 502, 113S, Ct. 2742 125 L. Ed. 2d 407 that the trier of fact can infer the ultimate fact of discrimination from

the falsity of the employer's proffered explanation, Id at 2108 a fact finder, is entitled to consider a party's dishonesty about a material fact as "affirmative evidence of guilt". Id. At 2108 citing Wright v. West, 505 U.S. 277, 296; 112 S. Ct. 2482, 120 L. Ed. 2d 225 (1992). The Petitioner has shown that Respondent's unreliability and tendentiousness of the testimony given by Col. Thomas under oath is evidence of guilt and should be heard by the jury. In the instant case, a reasonable trier of fact found out why Col. Thomas lied repeatedly about his intentions and doings against the Petitioner because he was being fired[12] by Col. Thomas and that all other division Supervisors under Col. Thomas command were evaluated and rated is in itself a genuine issue of material fact that can be best resolved at trial. There are instances of genuine material[13] facts that should be heard

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[12] To be rated, Col. Thomas had to prepare performance standards the year before because an employee is rated for a 12 month period or a year. Col. Thomas has admitted that he did not have any proof that he prepared any performance standards though he remembered preparing performance standards for all other supervisors under his command. Performance standards and performance evaluators are preserved in the employees official file, the attorney resources record...

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and the EEO record. Why does the respondent not produce proof to the Petitioner? Therefore Thomas knew twelve months before the firing that he was going to fire the Petitioner and therefore no rating was required.

[13] The EEOC MD 110 Chapter 6, defines material evidence thus

" Material Evidence

> Evidence is material when it relates to one or more of the issues raised in the complaint or raised by the agency's answer to it. To determine whether evidence is material, one must look to the claims of discriminatory conduct and resultant harm contained in the complaint and the agency's answers to the claims. If the evidence relates to one or more of those claims, then it relates to the issues presented in the complaint, and it is material."

by jury. It is undisputed that the Petitioner has established a prima facie case of discrimination by showing direct evidence linking the protected activity, previous involvement in Title VII activity, and his immediate supervisor's decision to deny Petitioner a performance rating. The proffered reasons by his Supervisor Col. Thomas was that:

1. Col. Thomas was not the Petitioner's immediate Supervisor and he was not the Petitioner's rater [22a-23a]. Petitioner's Job Description indicates that Thomas was his supervisor [40a].
2. No performance rating was required, because Petitioner was being removed from service, [23a].

Petitioner asserts that the Respondent proffered non-discriminatory reason for denying him a 1996-1997 Performance Evaluation was a pretext for retaliation. Specifically, Col. Thomas in interrogatories and depositions has testified that he, Col. Thomas, was not the Petitioner's rater and that Col. Hough was. In Thomas' Deposition he testified:

> "Q. By the way, when you're rating someone, do you establish performance standards with that person being rated?
> A. Yes
> Q. Had you done that with Economou?
> A. I did that with all the division chiefs.
> Q. What were the performance standards you established with Economou?
> A. I don't remember what the specific performance standards were.
> Q. Well, is there perhaps a document that you could identify that might shed some light on the answer to that question?
> A. There's a support document form that's prepared at the start of each rating period, but I didn't deep a copy of that. And I don't know if the human resources office or Mr. Economou might have a copy of that.

A. I believe it's called a support form, Performance Appraisal Support Form.

Q. And in that the performance standards would be laid out?

A. Yes. "

The above questions and answers indicate that the decision maker, Col. Thomas, was the rater of the Petitioner as he, Col. Thomas, was the rater of all the division chiefs under his command. It is a question of mendacity here in this instance when Col. Thomas gives two different answers for the same question. Once, Col. Thomas states that Col. Hough was the rater, the immediate supervisor and the person responsible for completing form 7222. [22a] Then in [26a] and in [22a] Col. Thomas states under oath that he was the rater of all subordinate supervisors except Economou. The job description of the Petitioner position currently in force at the time of the alleged retaliation indicates that the Petitioner's immediate supervisor was the District Commander [31a]. Further, Army Regulation 690-400, titled Total Army Performance Evaluation System defines a rater as "the individual in the Ratee's chain of command, normally the immediate supervisor, who establishes performance expectations and who proposes overall performance appraisals." Therefore, Col. Thomas proffered reasons for not preparing Form 7222-1 is prextural due to the mendacity of the answers. One of the reasons given by Col. Thomas for not performing a performance evaluation for the Petitioner was that the Chief of Human Resources told him that he did not have to rate the Petitioner. This event, Col. Thomas testified, took place in September/October time period [26a]. This reply by Col. Thomas is untrue. AR 690-400 under paragraph 1-5 if AR 690-400, the Army requires that all civilians will have written performance plans and should be in place 30 days from the beginning of each rating Period [26a]. Accordingly, the Petitioner should have had a written performance plan prepared and singed for him in July1, 1996 and should have had a midpoint evaluation in six months after that on

January 1997. A final performance rating should have been completed by July 30, 1997 in accordance with AR 690-400 Para 1-5. Now the notice of the Proposed Removal from Service was issued in August 1997, sixty days after the deadline for the Petitioner's rating as per AR 690-400 Para. 1-5 (a&b). Thus the reasons given by Col. Thomas for not preparing a written performance plan for the Petitioner in August 1996 was that the Petitioner was going to be fired in December 1997 as testified by Col. Thomas.

"Q. When did Miss Cardone tell you you didn't have to rate Economou?

A. Probably sometime in September, October time period when the ratings were due. As I was preparing ratings for other senior leaders, I may have asked the question about what do we do about Mr. Economou."

The above reply by Col. Thomas is significant in many ways in that he is lying under oath. Col. Thomas testified previously that he was not the rater and that he was not the Petitioner's immediate supervisor. Col. Thomas restates that: "...as I was preparing ratings for the other senior leaders." [26a] Col. Thomas also testified the following:

"Q. Weren't you his immediate supervisor Colonel?

The Witness: No, his immediate rater was Lieutenant Colonel Hough. I was the senior rater." [22a]

When Col. Thomas was asked about the Petitioner's job description, a document that spells out who is his immediate supervisor Col. Thomas testified:

"His job description was the Chief of the Construction Division within the district; and as such was responsible to me, the District Engineer..."[22a]

The above testimony clearly defines that the Petitioner was responsible to Col. Thomas and not LTC Hough. In fact, when Col. Thomas was asked to state if there is any document that supports his statements he answered:

"A. I'm sure that any of his performance ratings would have shown that Colonel Hough was his immediate rater. Then there should have been within human - I don't know how long they keep those records - but within Human Resources

office, there's normally a chart that shows the rating chain. And it would have shown that except for on of the GS-15s all of the GS-15s were rated by Lieutenant Colonel Hough." [23a]

Col. Thomas did not offer any evidence to substantiate his allegations that LTC Hough was Petitioner's immediate supervisor. It is obvious Col. Thomas, the decision maker in that action, has overtly attempted to veil his responsibilities, and the denial of a year's rating is an adverse action leveled against the Petitioner in retaliation for his Title VII protected EEO activity. Why was Col. Thomas trying to detract and point elsewhere the responsibility of the denial of the yearly performance rating when fact's presented point to him? Wasn't Col. Thomas' intent to cover up the alleged retaliatory action of his denial of Petitioner's right, in AR 690-400, to be rated for his performance for the years 1996-1997? These arguments presented are evidence of genuine material facts to be heard by a jury not by District Court as is the case here. A plaintiff who can proved "solid circumstantial evidence" in support of her claim should have the opportunity to prove her case at trial. Hollander, 895 5.2d at 85., Anderson v. Liberty Lobby, Inc., 477 U.S. 5242, 250, 9ILED. 2d 202, 1065. ct. 2505 (1986).

Col. Thomas had every reason to attempt to hide his tracks from this case. During interrogatories Col. Thomas was asked:

"Did you ever discuss Mr. Economou with Col. Thomas York regarding complainant's previous EEO activity. If yes, when?

I had no discussions with Colonel York regarding Mr. Economou's previous EEO activity." [22a]

In another instance, Col. Thomas was asked to reply to another question.

"Where you made aware of Mr. Economou's previous EEO activity by the previous New York District Commander Col. York?

Only in the most general of terms. I was aware that Mr. Economou was returning to the District after an absence

related to an EEO issue. In fact, Colonel York, District Counsel and District EEO officer all strongly advised that specific information regarding that activity not be made available to me." [22a]

In another instance during deposition Col. Thomas was asked the same question again and replied:

"Other than what I previously said, that Colonel York had told me he was returning to the district in an issue related to some EEO activity or that there were ongoing EEO issues with Mr. Economou. But, I mean, the fact that it existed he made me aware of. But there were no discussions about any substance whatsoever. This is absolutely the truth!"

These contradictory replies to questions regarding the previous N.Y. District commander Col. York and the then current commander Col. Thomas reveal mendacity of issues of fact that should be heard by a jury not a District Judge.

During deposition Col. Thomas was asked about retaliation and he replied:

"Q. So where you concerned about retaliation or the appearance of EEO activity?

A. I was certainly concerned that the appearance of retaliation. There was no retaliation but I was concerned that there also be no appearance of retaliation."

[28a]

Now why should there be a concern about retaliation if there was no retaliation? Col. Thomas' answers to the above questions reveal issues of fact worthy of a jury's attention.

Petitioner's reasonable accommodation claim should not be sustained because the Army Corps of Engineers failed to provide Petitioner with reasonable accommodations for more than three years after they first became aware of Petitioner's disability. The Rehabilitation Act is violated when an employer fails to provide reasonable accommodations to a disabled employee who is otherwise qualified to perform his job. Jackan v. New York State Department of Labor, 205 F.3d 562, 566 (2d Cir. 2000). Petitioner has satisfied his burden of making a prima facie showing, in that: (i) he is an individual with a disability;

(ii)the Army Corps had notice of the disability; (iii) plaintiff is otherwise qualified to perform the essential functions of his position either with or without accommodation; and(vi) the employer refused to make such accommodations. See Mitchell v. Washington Central School District, 190 F.3d 1,6 (2d Cir. 1999).

For the purposes of his motion for summary judgment, Respondent has conceded that Petitioner has satisfied the first three elements of the prima facie case. The fourth element, requiring the employer to make such reasonable accommodations, is a material fact in dispute. There exists a three and one half year difference of fact as to when the Army Corps of Engineers was first notified as to Petitioner's disability in May of 1994. On September 8, 1997, the Army Corps first recognized the existence of Petitioner's disability. The respondent never provided accommodation.

CONCLUSION

For the above reasons a writ of certiorari should be issued to review the judgment opinion of the Court of Appeals of the Second Circuit.

Respectfully Submitted,

Constantine Economou

CONSTANTINE J. ECONOMOU
32-05 Newtown Avenue Apt 4D
Astoria, N.Y. 11102
Telephone: (718) 777-0462

Sept 6, 2002

APPENDICES

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2001

(Argued: October 22, 2001 Decided: April 05, 2002)

Docket No. 01-6068

CONSTANTINE ECONOMOU,
Plaintiff-Appellant,

v.

LOUIS D. CALDERA, Secretary, United States Department of Army,
Defendant-Appellee.

BEFORE: FEINBERG, OAKES, F.I. PARKER, Circuit Judges.

Appeal from the judgment of the United States District Court for the Southern District of New York (Andrew J. Peck, Magistrate Judge) dismissing plaintiff's complaint, entered on February 22, 2001, in accordance with a September 22, 2000 Opinion and Order granting summary judgment to Louis Caldera, Jr., Secretary of the Army, for failure to exhaust administrative remedies on plaintiff Economou's discriminatory and retaliatory investigation claim, reasonable accommodation claim, and denial of performance rating claim.

AFFIRMED.

Constantine Economou, Pro Se,
Patchogue, NY,
for Plaintiff-Appellant.

Ramon E. Reyes, Jr., Assistant United States, Attorney, Southern District of New York, New York, for Defendant-Appellee.

F.I. Parker, Circuit Judge:

Constantine Economou Appeals pro se[1] from the judgement of the United States District Court for the

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[1] Although Mr. Economou is pro se on this appeal, he was acting with counsel at all material times throughout the proceedings below. Mr. Economou argues that the counsel noted on is initial application to the Merit Systems Protection Board ("MSPB") was unavailable during his dealings with that agency and that he should not be considered as "counseled" during his MSPB inquiries. The record demonstrates, however, that Economou's counsel represented him during his prior EEO complaints and received copies of all Mr. Economou's filings with the MSPB. As such, this Court finds that Economou had "access to means of acquiring knowledge of his rights and responsibilities" under the administrative scheme and will consider him as counseled during the course of the administrative proceedings.

Southern District of New York (Andrew J. Peck, Magistrate Judge)[2] dismissing plaintiff's complaint, entered on February 22, 2001, in accordance with a September 22, 2000 Opinion and Order granting summary judgment to Louis Caldera, Jr., Secretary of the Army, on plaintiff Economou's discriminatory and retaliatory removal and investigations claims, reasonable accommodation claim, and denial of performance claim. Economou does not challenge the jury verdict entered by the same February 22, 2001 order finding for the defendant on Economou's retaliatory denial of training claim.

I.

Economou argues that the district court erred in granting summary judgment to his employer, the Army Corps of Engineers, on his claims that the Army discriminated against him because of his age (sixty-nine at the time of his dismissal) , national origin (Greek) , and disability (carpal tunnel syndrome) , and retaliated against him because of his previous complaints of discrimination, in violation of the Age Discrimination in Employment Act, 29 U.S.C. § 2000e et seq., and the Rehabilitation Act of 1964, 42 U.S.C. §§ 701-794, by removing him from employment on December 19, 1997, conducting unnecessary investigations of him during his term of employment , denying him appropriate accommodation for his disability, and refusing to conduct an annual performance review prior to his termination in 1997. Economou v. Caldera, No. 99-CV-12117, 2000 WL 1844773, at *1 (S.D.N.Y., Dec. 19, 2000). Although we affirm the majority of these determinations for

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Smith v. Am. President Lines, Ltd., 571 F.2d 102, 109 (2d Cir. 1978); see also Angotti v. Kenyon & Kenyon, 929 F. Supp. 651, 658 (S.D.N.Y. 1996) (noting authority for denying equitable relief from misinterpretation of EEOC regulations to parties represented by counsel).

2 Magistrate Judge Peck was proceeding by consent of the parties. See 28 U.S.C. § 636 (c) .

substantially the same reasons stated by the district court, we address the district court's grant of summary judgment on Economou's removal claim more thoroughly because of the important issue of administrative exhaustion it raises.

II.

Economou is a seventy-two-year-old Greek-American engineer who in 1997 was removed from employment with the Army Corps of Engineers after twenty-nine years of service. In August 1997, the Army instituted removal proceedings against Economou based on allegations that "he made false and fraudulent statements, i.e., overstated and altered receipts for taxi expenses, on three travel reimbursement vouchers" in 1996 and 1997. Economou, 2000 WL 1844773, at *5-6. After a hearing, the Army issued a Notice of Decision dated December 17, 1997, informing Economou of his removal effective December 19, 1997, and alerting him that (1) he could appeal to the Merit Systems Protection Board ("MSPB") to contest the action and (2) if Economou believed that the action was discriminatory, he could appeal to the New York District Equal Employment Office ("EEO").[3] Id. At *7.

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[3] On appeal, Economou argues that the Army's Notice of Decision "misinforms, misleads and entraps the claimant" by failing to make clear that a potential claimant may file initially with either the MSPB or the EEO, but not both. This Court has found equitable relief appropriate when an agency misleads or misdirects a claimant so as to prevent the claimant from seeking an administrative remedy. See South v. SAAB Cars USA, Inc., 28 F.3d 9, 11-12 (2d Cir. 1994); Miller v. Int'l. Tel. and Tel., Corp., 755 F.2d 20, 25 (2d Cir 1985); Smith v. Am. President Lines, LTD., 571 F.2d 102, 109 (2d Cir. 1978). The Notice of Decision in this case, however, does not create the need for such relief. While not specifically stating that a claimant may bring an initial appeal to either the MSPB or the EEO, the Notice alerted Economou to the availability of the two remedies, explaining that discrimination claims should be pursued with the EEO, and referred the recipient to each body's procedural rules. The Notice included a phone

BEST AVAILABLE COPY

A. Administrative Proceedings

Economou was no stranger to the administrative review process. In February 1997, Economou filed a formal EEO complaint challenging the process by which his performance during the 1995-1996 term had been evaluated and alleging that he was denied training and performance awards provided to other workers. Six months later, Economou filed two formal EEO complaints alleging retaliation for his prior filing. On October 4, 1997, Economou filed another formal complaint with the EEO alleging that his proposed removal from Army employment reflected discrimination on the basis of national origin and retaliation for his prior EEO activities.

After receiving the Army's December 19, 1997 Notice of Decision, Economou again sought help from the EEO, filing, on January 7, 1998, a "Request for Assignment of EEO Counselor" – a preliminary step towards pursuing a formal EEO complaint. Rather than wait for a response from the EEO, however, on January 14, 1998, Economou filed a mixed case appeal[4] with the MSPB. In his appeal, Economou contented that the Army had committed procedural errors in effectuating his removal and that the removal was in

---

number for the EEO, and attached a copy of the MSPB rules and appeal form. Furthermore, once Economou began to pursue a remedy with the MSPB, the MSPB conducted an extensive review of the status of his EEO proceedings before accepting jurisdiction. Even absent an explicit statement of the "either or" nature of the initial filing process, therefore, Economou, and his counsel, had ample opportunity to review the relevant guidelines before withdrawing the MSPB appeal three months after its filing. This Court thus finds Economou's assertion that the Notice of Decision was misleading without merit.

[4] "A mixed case appeal is an appeal filed with the MSPB that alleges that an appealable agency action was effected, in whole or in part, because of discrimination on the basis of race, color, religion, sex, national origin, handicap or age." 29 C.F.R. § 1614.302 (a) (2) (1998).

retaliation for his prior EEO activity and in continuation of an on-going pattern of discrimination that violated Title VII. Id. At *9. On the MSPB application form, Economou indicated that he had filed a formal complaint with another agency (the EEO) concerning the same matter, but noted that "the case [was] in the precomplaint stage."

On January 20, 1998, the MSPB, based on Economou's indication that he was also pursing EEO remedies, issued an Order to Show Cause instructing Economou to demonstrate that the case was within the MSPB's jurisdiction. The order explained that if Economou had already filed a formal complaint with the EEO, the MSPB would not have jurisdiction until thirty days after the resolution of the complaint by the EEO or 120 days after filing. Id. In response to the order, Economou sent a reply dated February 10, 1998, indicating that he was "[p]resently . . . pursuing [his] case through the EEOC avenue." The MSPB continued to pursue the jurisdictional question in a telephone conference on March 6, 1998. Following that conference, Economou submitted a letter to the MSPB reiterating his wish to remain in the EEO process and attaching a formal complaint he had filed with the EEO on March 5, 1998, well after his earlier MSPB filing, alleging that he had been removed from employment based on his Greek origin, physical disability, and age. During a second telephone conference, on April 1, 1998, Economou informed the MSPB that he was withdrawing his appeal. Based on the information gathered in these exchanges, the MSPB took jurisdiction over the case (apparently concluding that as Economou had not filed a formal EEO complaint until March 5, 1998, the MSPB had jurisdiction to act on his January 14, 1998 appeal) , and dismissed the appeal as withdrawn. Id. At *10.

In response to Economou's March 5, 1998 formal filing, the EEO, in November 1999, notified Economou that as 180 days had passed since his filing, he was free to pursue his claims in federal court. Id. At *11.

B. District Court Proceedings

Economou filed a complaint in federal district court on December 17, 1999. In an amended complaint filed August 14, 2000, Economou alleged that the Army had discriminated against him based on his national origin, age, and disability, and had retaliate against him for his EEO activity, thus violating Title VII, the ADEA, and the Rehabilitation Act by (1) terminating his employment on December 19, 1997, (2) conducting "investigations" of him during his period of Army employment, (3) failing to reasonably accommodate his disability, (4) failing to provide training equivalent to that offered to other supervisors, and (5) failing to conduct an annual performance review in 1997.

The Army did not initially raise the defense that Economou had failed to exhaust his administrative remedies prior to bringing suit. Approximately two weeks after filing its answer to Economou's amended complaint, however, at a May 30, 2000 status conference, the Army raised the exhaustion issue. In early September 2000, the Army moved to amend its answer so as to included the exhaustion argument. The district court granted the motion as part of its December 18, 2000 opinion and order, concluding that Economou had not demonstrated prejudice, undue delay, or any other reason to deny the motion, and noting that Economou had been aware of the Army's intention to make the argument since shortly after he brought suit, defeating his claims that the amendment would detrimentally affect his trial preparation.

With respect to Economou's discriminatory and retaliatory removal claims, the district court granted summary judgment, concluding that Economou had not exhausted his administrative remedies prior to bringing suit since he had first filed formally with the MSPB and then abandoned his complaint in that forum. The court ruled that after a plaintiff elects to proceed in one forum, "thereafter the plaintiff is precluded from availing himself of the other forum." Id. At *18.

The district court also granted summary judgment on the investigation, reasonable accommodation, and denial of performance rating claims on the basis of lack of evidence or other defects in those claims, but allowed Economou to proceed to trial on the retaliatory denial of training claim. The jury's ultimate verdict for the defendant is not challenged on appeal.

While this Court affirms the district court's decisions on the grant of the Army's motion to amend, and the grant of summary judgment on the investigation, reasonable accommodation, and denial of performance rating claims for substantially the same reasons stated by the district court, we review the grant of summary judgment on the removal claims, and specifically the district court's determination that Economou failed exhaust these claims in the administrative proceedings, in more detail.

III.

We review the court's grant of summary judgment de novo, Skubel v. Fuoroli, 113 F. 3d 330, 334 (2d Cir. 1997).

Our affirmation of the district court's exhaustion finding relies heavily on the language of the regulations governing administrative review of equal employment claims. 29 C.F.R. § 1614 governs federal sector equal employment opportunity. Section 1614.302 explains that "[a]n aggrieved person may initially file a mixed case complaint with an agency [the EEO] pursuant to this part or an appeal on the same matter with the MSPB. . ., but not both."[5] 29 C.F.R. §

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[5] This Court will apply the 1998 C.F.R. because Economou filed his formal complaint with the MSPB in 1998; the pertinent rules, however, did not change between the 1997 and 1998 versions. In the 1998 provisions, "mixed case complaint" is defined as "a complaint of employment discrimination filed with a federal agency based on race, color, religion, sex, national origin, age or handicap related to or stemming form an action that can be appealed to the Merit Systems Protection Board (MSPB)." 29 C.F.R. § 1614.302 (a) (1) (emphasis added). "Mixed case appeal" is

1614.302 (b) (1998) (emphasis added). Section 1614.107 (d) emphasizes the exclusive nature of an initial filing with the MSPB or EEO by listing among the reasons for which the EEO may dismiss a complaint that, "the complainant has raised the matter . . . in an appeal to the Merit Systems Protection Board and § 1614.301 or § 1614.302 indicates that the complainant has elected to pursue the non-EEO process." 29 C.F.R. § 1614.107 (d) (1998).[6]

This binding "election" between the MSPB and EEO remedies occurs as soon as a formal petition is filed in either forum. 29 C.F.R. § 1614.302 (b) ("whichever [the MSPB appeal or the EEO complaint] is filed first shall be considered an election to proceed in that forum"). As § 1614.301 explains, "[a]n election to proceed [with an EEO action] is indicated only by the filing of a written complaint; use of the pre-complaint process . . . does not constitute an election for purposes of this section." 29 C.F.R. § 1614.301 (a) (emphasis added). Thus, according to the plain language of the governing regulations, the filing of the first formal petition determines the appropriate forum for agency review.

As the Court's review of the procedural history in this case indicates, Economou filed his first formal petition on January 14, 2000 with the MSPB.[7] Under the clear language

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defined as "an appeal filed with the MSPB that alleges that an appealable agency action was effected, in whole or in part, because of discrimination on the basis of race, color, religion, sex, national origin, handicap or age." 29 C.F.R. §§ 1614.302 (a)(2) (emphasis added).

[6] This provision has since been renumbered as 29 C.F.R. § 1614.107 (a) (4) (2001).

[7] Economou attempts to argue here, as before the district court, that his prior EEO complaints should serve as sufficient "filings" to satisfy the formal filing requirement, giving EEO, not the MSPB, jurisdiction as the initially "elected" forum. As the district court aptly demonstrated, however, Economou's prior filings were distinct from his March 5, 2000 discriminatory and retaliatory removal claims, and his later complaint, not to amend any previously filed complaints.

of the governing regulations, that formal filing designated the MSPB as the administrative forum in which Economou was bound to exhaust his claims.[8]

This conclusion is consistent with this Court's interpretation of an earlier, but parallel, version of the forum election regulation. In Bornholdt v. Brady, this Court read the pre-1996 version of the election provision to mean that "[t]he claimant is deemed to have elected to proceed in whichever administrative forum he has filed first." 869 F.2d 57, 62 (2d Cir. 1989) (interpreting then-§ 1613.403, which stated, like 1998's § 1614.302 (b), that "whichever is filed first (the mixed case complaint [EEOC] or the appeal [MSPB] shall be considered an election to proceed in that forum'); see also German v. Pena, 88 F. Supp. 2d. 222, 225 (S.D.N.Y. 2000) (finding plaintiff bound to exhaust all claims before the MSPB by initial filing of a formal complaint in that forum). Although Economou's case presents a unique factual situation in that his withdrawal from MSPB proceedings was in favor of an action before another agency rather than a claim before a federal court, the principles binding Economou to his first choice of forum are not new. As stated in the regulations and echoed in this Court's prior decisions, a plaintiff is bound to exhaust administrative remedies in the forum in which he first files a formal petition. Neither a pre-petition inquiry to another agency, nor the apparently harsh result in this case alters this rule. This Court will not bend the plain language of the regulations to allow parties to

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[8] Notably, ADEA claims may be pursued either after a final administrative decision is issued or thirty days after the plaintiff gives notice to the EEOC of an intent to file. This Court held in Wrenn v. Secretary, Department of Veterans Affairs, however, that despite these alternative means of bringing age discrimination claims to the district court, a plaintiff who chooses to begin the administrative review process is obliged to exhaust that review before filing a civil action. 918 F. 2d 1073, 1078 (2d Cir. 1990). Thus, because Economou filed first with the MSPB, he was bound to exhaust all his claims, including the ADEA arguments, in the administrative arena before pursing them in the district court.

browse at will through multiple administrative reviews in search of a more favorable outcome.

IV.

For the reasons set forth above, this Court affirms the district court's grant of summary judgment on Economou's discriminatory and retaliatory removal claim for failure to exhaust his administrative remedies, and affirms Economou's remaining claims for substantially the same reasons stated by the district court.

The judgment of the district court is AFFIRMED.

FORMAL COMPLAINT

1. NAME OF COMPLAINTANT (Last, First, Middle Initial)
   Economou Constantine J
2. SSN
   125-24-2159
3a. HOME TELEPHONE NO
   718/4637539
3b. WORK TELEPHONE NO
   NA
4. ADDRESS Street, City, State, and Zip Code
   3-24 126th STREET
   College Point, New York 11356
5a. ARE YOU BEING REPRESENTED
   Yes
5b. IF YES, NAME OF REPRESENTATIVE
   Alan Serrins, Esq.
   233 Broadway
   New York, NY 10279
6a. NAME OF ARMY ORGANIZATION YOU BELIEVE DISCRIMINATED
   AGAINST YOU
   New York District Corps of Engineers
6b. ADDRESS OF ALLEDGED DISCRIMINATION ORGINAZATION
   Jacob B. Javits Federal Bldg
   NEW YORK, NEW YORK 10278-0090
7. MAJOR ARMY COMMAND ACTIVITY YOU BELIEVE DISCRIMINATED
   AGAINST YOU
   US Army Corps of Engrs
8. DATE ON WHICH MOST RECENT ALLEGED DISCRIMINATION
   OCCURRED
   19 Dec 1997
9. ARE YOU WORKING FOR THE FEDERAL GOVT
   No (retired)

10. NAME OF AGENCY WHERE YOU ARE CURRENTLY EMPLOYED

N.Y. District Corps of Engrs

11. ADDRESS OF YOUR CURRENT EMPLOYER include City, State

12a. TITLE OF YOUR CURRENT JOB

12b. PAY PLAN/SERIES/GRADE

(retired GM 808-15)

13. Reason you believe you were discriminated against (Check below).

a. RACE (State your race) → X

b. COLOR (State your color) →

c. RELIGION (State your religion) →

d. NATIONAL ORIGIN (State your Nat. Origin) → X Greek

e. HANDICAP X physical

f. SEX

g. AGE → X 69

h. REPRISAL / Retaliatory

14a. I HAVE DISCUSSED MY COMPLAINT WITH AN EEO COUNSELOR (See reverse)

Yes

14b. Kathleen A. Carpenter

15.DATE OF FINAL INTERVIEW

2 Mar 1998

16.EXPLAIN SPECIFICALLY HOW YOU WERE DISCRIMINATED AGAINST

See page 3 of 3

17.LIST IN ITEM 20: THE NAMES OF YOUR WITNESSES AND WHAT FACTUAL INFORMATION EACH WILL BE EXPECTED TO CONTRIBUTE THROUGH HIS/HER TESTIMONY TO THE INVESTIGATION OF YOUR COMPLAINT.

18.WHAT SPECIFIC CORRECTIVE ACTION DO YOU WANT TAKEN ON YOUR COMPLAINT? (If more than one allegation is being made, write overall corrective action

desired and the specific corrective action desired for each separate allegation.)
Reinstate to original position as Chief of Construction Division, Legal Fees, and Compensatory Damages

CONTINUATION OF ITEM 16

I submit the following allegations as part of my formal EEO complaint.

ALLEGATION 1. On 19 December 1997, I was wrongfully terminated from Federal employment on pretextual charges leveled against me by Col. Thomas, Commander, New York District Corps of Engineers, and my immediate supervisor, in collaboration with Col. George Clarke, Deputy Commander NAD. I allege, this action was in retaliation for having previously engaged in protected EEO activity. I became reasonable aware of this on 8 December, 1997.
ALLEGATION 2. Col. Thomas had denied my 1997 performance evaluation rating (TAPES) and as a result he has denied my performance award for the same period. I

have received disparate treatment as compared with similarly situated New York District employees in retaliation for having been engaged in EEO protected activity. I became reasonably aware of this on 15 December 1997.

ALLEGATION 3. I have been denied reasonable accommodation in the work place for being handicapped, in violation of the Americans with Disabilities Act, as a means of retaliation for having been in EEO protected activity. I became reasonably aware of this on 19 December, 1997.

I have been wrongfully discharged from Federal employment in retaliation for having previously engaged in EEO protected activity.

I have been denied my performance evaluation and performance award for the rating period June 1996-1997, in retaliation for my previous EEO activity.

I have been denied reasonable accommodation for being handicapped as a means of retaliation for my previous EEO activity.

New York District Office

Edwina L. St. Rose
Trade Center, 18th Floor
Administrative Judge
New York 10048-1102
(212) 748-8471
Phone: (212) 748-8500

7 World

New York,

General Fax: (212) 748-8464
Legal Fax: (212) 748-8465

November 4, 1999

Mr. Alan Serrins
Dienst & Serrins, LLP
Attorneys At Law
233 Broadway
New York, NY 10279

Dear Mr. Serrins:

Re: Discrimination Complaints of Constantine J. Economou
EEOC Hearing Nos. 160-98-8296X, 160-99-8274X and 160-99-8450X.

This in response to your recent request that I issue a Right to Sue Letter in the above-referenced matter so that you may bring the matter before the United States District Court, Southern District of New York. Please be advised that Right to Sue Letters are not issued in the Federal Sector. However, pursuant to 1614.408, a complainant may file a civil action in an appropriate United States District Court after 180 days from the date of filing an individual complaint if an appeal has not been filed and a final decision has not been issued. Since the above-referenced consolidated complaints meet that criteria, via this letter, I am notifying the Agency of the withdrawal of your letter, I am notifying the Agency of the withdrawal of your client's request for a hearing and his intent to file a civil action.

"s/Edwina L. St. Rose"
Edwina L. St. Rose
Administrative Judge
(212) 748 7471

cc: Constantine J. Economou
Lorraine Lee, Esq.
Estelle Capowski

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

CONSTANTINE ECONOMOU, PLAINTIFF,	
-vs-	Index No. 99CIV12117 (JSM) (AJP)
TOGO D. WEST, JR. SECRETARY UNITED STATES DEPARTMENT OF THE ARMY, DEFENDANT,	AMENDED COMPLAINT (JURY TRIAL DEMANDED)

Tuesday, August 8, 2000
Fort Belvoir, Virginia

Deposition of

COLONEL GARY THOMAS

called for examination by counsel for the Plaintiff, pursuant to notice, held at the Humphreys Engineering Center, Fort Belvoir, Virginia, beginning at 10:00 a.m., before Theresa R. Hollister, a Notary Public in and for the Commonwealth of Virginia, when were present on behalf of the respective parties:

REALTIME REPORTING, INC.
183 BROADWAY
HICKSVILLE, NEW YORK 11801
516-938-4000

APPEARENCES:

On behalf of the Plaintiff (Telephonically):

JOSEPH A. TURCO, ESQ.
DIENST & SERRINS, L.L.P.
233 Broadway - 18th Floor
New York, New York 10279
(212) 406-1700

On behalf of the Defendant:

RAMON E. REYES, JR., ESQ.
U.S. Attorney's Office
Southern District of New York
100 Church Street - 19th Floor
New York, New York 10007
(212) 637-2740

Others Present:

Lorraine Lee, ESQ.

CONTENTS

EXAMINATION OF COLONEL GARY THOMAS
BY MR. TURCO:
BY MR. REYES:

EXHIBITS

(EXHIBITS WERE PREMARKED BY THE ATTORNEYS.)

What? Say hello or anything like that?
MR. TURCO: No, I'm talking about business matters, sir.
THE WITNESS: It was my habit to - - when I was there in the district every day to go to different divisions and talk to both branch chiefs or individual engineers or scientists or technicians at their desk and talk to them about what they were doing. And I did that on a fairly frequent basis.
BY MR. TURCO:

Q. How frequently did you meet with Mr. Economou about, you know, the district's business?

A. We had a formal staff meeting once a week with all the division chiefs. And other than that, it would be on a case-by-case basis depending on the specific issue. Sometimes those meetings would be in my office; but on many cases , if it was a quick issue, I would go down to a division chief's office and discuss the issue with them at their desk.

Q. When did you first become aware that Economou had EEO complaints?

A. I first Became generally aware that there were EEO issues about the time that I got to the district.

Q. Who told you?

A. At that time I was advised that Mr. Economou had been out of the district for some time and that it was related to an EEO issue, and I was advised either by the deputy, Colonel Hough, or by the outgoing commander, Colonel York.

Q. You can't recall who at this time?

A. No. There were general discussions when I arrived at the district with the outgoing commander and the deputy and other senior leaders, and we're talking about the general hot issues that were ongoing in the district, and the fact that the construction chief was coming back to duty soon was one of those issues.

Q. Where were you when you learned this information?

A. I can't remember exactly where I was.

Q. Do you recall who was in the room?

A. No.

Q. What was your reaction?

A. I noted that I had a chief of construction coming back to the district soon after an absence.

job description as?

A. His job description was the Chief of the Construction Division within the district; and as such, he was responsible to me, the District Engineer, for the management and the supervision of the employees under his control and for the efficient execution of the resources to which he had been entrusted.

And I might add that as one of the senior managers in the district to work with me and the other senior managers to guide the district in the accomplishments of its overall missions.

(Pause.)

Q. Why is it that you say that Hough was the immediate supervisor of Economou?

MR. REYES: Objection to form.

Mischaracterizes his testimony.

BY MR. TURCO:

Q. Weren't you his immediate supervisor, Colonel?

MR. REYES: Objection to form.

THE WITNESS: No, his immediate rater was Lieutenant Colonel Hough. I was the senior rater.

BY MR. TURCO:

Q. Where does it say - - does it say that anywhere? Is there any document that you could point to that supports that statement?

A. I'm sure that any of his performance ratings would have shown that Colonel Hough was his immediate rater. Then there should have been within human - - I don't know how long they keep those records - - but within the Human Resources office, there's normally a chart that shows the rating chain. And it would have shown that except for one of the GS-15s all of the GS-15s were rated by Lieutenant Colonel Hough.

Q. Let me call to you attention to the performance rating period 1996-1997. Do you recall the rating of Economou during that period?

A. My recollection is that the ratings came due at some time after the removal action had been initiated where Mr. Economou had already been proposed by removal.

Q. By you, correct?

A. That's correct.

Q. Go on.

A. And under advice from Chief of Human Resources, Miss Cardone, she advised me that there was no requirement to do a performance appraisal on someone who was being proposed for removal. So, I did one.

Q. Did she refer to any code, rule or regulation to support her position?

A. I'm sure I she did, but I could not begin to tell you what that was.

Q. Did you ask her?

A. Yes, I'm sure I did at the time to make sure we were proceeding in an appropriate manner.

Q. Now, normally if you had issued a performance rating for that period, what kind of evaluation would you have given Economou?

A. Well, I mean that's purely speculative at this point. It certainly would have been influenced by the fact that we were removing him or proposing him to be removed for fraudulent preparation of documents. So my suspicion would have been it probably could not have been a good rating.

Q. By the way, when you're rating someone, do you establish performance standards with that person being rated?

A. Yes.

Q. Had you done that with Economou?

A. I did that with all the division chiefs.

Q. What were the performance standards you established with Economou?

A. I don't remember what the specific performance standards were.

Q. Well, is there perhaps a document that you could identify that might shed light on the answer to that question?

A. There's a support form that's prepared at the start of each rating period, but I didn't keep a copy of that. And I don't know if the human resources office or Mr. Economou might have a copy that.

Q. What's that document called?

A. I believe it's called a support form, Performance Appraisal Support Form.

Q. And in that the performance standards would be laid out?

A. Yes.

Q. To the best of your recollection, what kind of performance standards would you lay out or set forth for a supervisor such as Economou?

MR. REYES: Object to the form.

THE WITNESS: It was my goal to try to keep all the GS-15s, the senior manager performance standards, to be fairly consistent across the board, emphasizing those performance issues that emphasize team work, and accomplishing the district's primary goals an objectives. But I can't recall specific - - there were probably anywhere between half a dozen to a dozen specific elements to those standards. And I don't recall what those were at the time.

BY MR. TURCO:

Q. When did Miss Cardone tell you you didn't have to rate Economou?

A. Probably sometime in the September, October time period when the ratings were due. As I was preparing ratings for the other senior leaders, I may have asked the question about what do we do about Mr. Economou.

Q. Where were you when you had this conversation?

A. Likely in my office.

Q. How long did the meeting last?

A. I doubt if there was a specific meeting on that issue. I met with, or tried to meet with the Chief of Human Resources. We had a standing meeting every week to discuss personnel issues, and it may have come up at that meeting. Or it may have come up at another private meeting, even, in her office. I don't know.

Q. Now, in that '96-'97 rating period, did anybody else not receive a performance rating other than Economou?

A. No, nobody else was being proposed for removal.

Q. How many other GM-15s similarly situated to Economou were under your command?

MR.REYES: Objection to form.

BY MR. TURCO:

Q. Did I say GM-15? I meant GS, I guess. Do you know what I mean, Colonel?

MR. REYES: He's thinking.

THE WITNESS: I'm counting now. There were probably about half a dozen.

BY MR. TURCO:

Q. Okay. Do you know if following that rating period, any of those half dozen received any awards, cash or otherwise, following those ratings?

A. I don't remember if all of them did, but I would think that probably most of them did.

Q. Let's go to our exhibits. There are a few there. I would like to ask you: Did you have an opportunity to review these exhibits this morning?

Q. Give me an example.

A. An example would be that when his deputy at the time, Mr. Tony Lavasanos, was being selected for something called the Executive Development Program and another individual from another district had also been selected and was being recommended to come to New York as part of that individual's development to come to New York to be the Deputy Chief of Construction, when MR. Economou was advised about this, he was very - - he became very adamant and emotional and made a number of what I consider to be fairly outrageous statements about people setting him up for

failure, taking away his deputy without his knowledge, assigning someone not qualified to be his deputy, as though we were somehow conspiring against him. And he said that in the strongest terms, and I thought that was inappropriate.

Q. Looking a the exhibit, your answer to question 3, is that still a true and correct answer?

A. Other than what I previously said, that Colonel York had told me he was returning to the district, hadn't been absent in an issue related to some EEO activity or that there were ongoing

I can't remember if I called in just Mr. Keogh initially, and then the others; or if everyone was together.

Q. Was that protocol, Colonel, to call in Mr. Keogh?

A. Well, I believed it was as the Chief of Law Enforcement and Security in the district. He was the one most concerned with law enforcement issues, and he was my expert in that area.

Q. Now, at the time that you called Keogh, was he aware of Economou's prior EEO activity?

A. I don't know whether he was. I don't know why he would have been.

Q. Have you ever had a conversation with him prior to that moment about Economou?

A. No. I would have had no reason to have talked to him about EEO activity. As a matter of fact, I didn't talk to anyone else in the district about that except the people who had a need to know, such as the EEO officer.

Q. Why did the EEO officer need to know?

A. About EEO activities?

Q. I'm sorry. Did you tell the EEO officer about these receipts that you noticed were doctored?

A. I'm trying to remember. I don't think initially she would have been party to that. I believe at some point as we began to get more evidence that there was a pattern of fraud, that we did discuss it with her. And the primary reason for talking to her about it, was because I wanted to be very certain that everything we did was absolutely not related or

could have been seen as related to any prior EEO activity. And I needed her advice on that.

Q. So were you concerned about retaliation or the appearance of retaliation of EEO activity?

A. I was certainly concerned that the appearance of retaliation. There was no retaliation, but I was concerned that there also be no appearance of retaliation.

Q. So what did you do to satisfy yourself that there would be no appearance of retaliation?

A. I think the most thing that I did was to make the decision to send the removal to our higher headquarters for final decision, and not to take that action within the district. One of our courses of action was to have Colonel Hough as he immediate supervisor do the proposal. In that case, I would be the deciding authority.

UNITED STATES DISTRICT COURT
SOURTHERN DISTRICT OF NEW YORK

----------X

CONSTANTINE ECONOMOU,

Index No.:
99CIV12117(JSM)(AJP)

Plaintiff,

AMENDED
COMPLAINT

(JURY TRIAL
DEMANDED)

-against-

LOUIS D. CALDERA, JR.,
SECRETARY, UNITED STATES DEPARTMENT
OF THE ARMY,

Defendant,

----------X

Plaintiff by his attorneys, DIENST & SERRINS, LLP, brings this action for discrimination in employment pursuant to:

1. Title VII of the Civil Rights Act of 1964, as codified, 42 U.S.C. §§ 2000e to 2000e-17 (amended in 1972, 1978 and by the Civil Rights Act of 1991, Pub. L. No. 102-166) (race, color, gender, religion, national origin);

2. Age Discrimination in Employment Act of 1967, as codified, 29 U.S.C. §§ 621-634 (amended in 1984, 1990, and by the Age Discrimination in Employment Amendments of 1986, Pub. L. No. 99-592, the Civil Rights Act of 1991, Publ. L. 102-166) and;

3. The Rehabilitation Act of 1973,§ 501.

PRELIMINARY STATEMENT

4. This is an action brought by a federal employee, wrongfully terminated from service, who takes the Federal Government at its word that all employees should receive

fair and equitable treatment in all aspects of their careers and that the work place should be free from discrimination of all types. Since 1987 four separate EEOC judges have found that the US Army Corps. Of Engineers unlawfully discriminated against the plaintiff, based upon his natural origin and for retaliation. However the US Army Corps. Of Engineers continues to discriminate against plaintiff.

5. The U.S. Army Corp. of Engineers discrimination against plaintiff includes termination of employment as a means of retaliation, failure to accommodate his disability, age discrimination, and discrimination based on national origin.

JURISDICTION

6. The jurisdiction of this Court is invoked pursuant to Title VII of the Civil Rights Act, as amended, §2000(e), et seq.

PARTIES

7. Plaintiff, Constantine Economou was born in Athens, Greece as a citizen of the United States and resides at 43 Circle Drive, Patchogue, NY 11772.

8. The US Army Corps of Engineers, as agency of the United States of America with its New York District Offices, located at 26 Federal Plaza, New York, NY 10278-0090.

FACTS

9. Plaintiff is an American citizen of Greek extraction who was born on July 11, 1929. He is a U.S. Army Veteran who served his country with distinction and who received an honorable discharge from the U.S. Army in 1952. Plaintiff is a professional engineer and architect who holds professional licenses in many states, including New York,

New Jersey and Connecticut. Plaintiff has been in Federal Service for 29 years.

10. Plaintiff held the position of Chief of the Construction Division, U.S. Army Corps. from November 5, 1991 to December 19, 1997 when he was wrongfully terminated by the Commander of New York District Colonel Gary Thomas for retaliatory reason.

11. Colonel Thomas' reasons for terminating the plaintiff, who at the time of the termination held 29 years of exceptional service with the U.S. Army Corps. of Engineers, were pretextual.

12. Colonel Thomas knew that the plaintiff had won a discrimination complaint with the EEOC against the previous New York District Commander Col. Tom York and acted in concert with Col. York by retaliating against the plaintiff by firing him in order to send a message to other New York District employees that exercising your rights by filing EEO complaints will get you fired.

13. Colonel Thomas had collaborated with the Commander of the North Atlantic Division of Major Milton Hunter in an array of investigations in order to discredit and discharge the plaintiff in the eyes of his subordinates, peers and supervisors. These investigations were designed by Col. Thomas and M.G. Hunter to create an abusive, hostile and stressful environment for the plaintiff.

14. Col. Thomas denied accommodation for the plaintiffs handicap as a means of retaliation for having engaged in EEO protected activity in the past.

15. Col. Thomas denied the plaintiff training given to other similarly situated supervisors, in further retaliation.

16. Col. Thomas denied the plaintiff a performance evaluation and as a result denied the plaintiff the monetary award associated with his work performance. Therefore, plaintiff was treated differently than other similarly situated supervisory employees.

17. See formal complaints (three) attached to this action as Exhibits "A", "B" and "C" for additional details regarding plaintiffs complaints.

COUNT I

18. Plaintiff reiterates and reallege paragraphs 1 through 17 with the same force and effect as if set forth herein.

19. Plaintiff was retaliated against in violation of the title of VII of the Civil Rights Act, 42USC § § 2000 et seq. because of his previous protected EEO activity.

COUNT II

20. Plaintiff reiterates and reallege paragraphs 1 through 19 with the same force and effect as if set forth herein.

21. Plaintiff was treated differently than other similarly situated Division Chiefs who are much younger than he is, in violation of the Age Discrimination Employment Act 29 USC §§ 621-634.

COUNT III

22. Plaintiff reiterates and reallege paragraphs 1 through 21 with the same force and effect as if set forth herein.

23. Plaintiff has been discriminated against due to his disability in violation of the Rehabilitation Act of 1973, § 501.

COUNT IV

24. Plaintiff has been discriminated against because of his ethnicity in that he was the only Division Chief in the entire Corps. of Engineers of Greek extraction when he was discriminated against, retaliated and terminated from Federal Service on pretextual grounds.

EXHAUSTION OF REMEDIES

26. Plaintiffs EEO complaints were filed on March 5, 1998 and August 11, 1997.

27. More than 180 days have elapsed. There has been no final agency decision.

28. The Court has jurisdiction over this complaint.

29. A Right to Sue Letter has been issued.

RELIEF

WHEREFORE, plaintiff respectfully requests an award of:

a. Declaratory judgment that plaintiff was harassed, discriminated and retaliated against;

b. Restoration of plaintiff to his original position as Chief of Construction Division of New York District Corps. of Engineers;

c. Back pay since December 19, 1997 to present back pay should consist of the difference between the plaintiff's yearly salary and his retirement pay;

d. Non-pecuniary damages;

e. Attorney's fees and costs of this action;

f. Exceptional rating evaluation of performance for the year 1996-1997

and performance award such given to other similarly situated supervisors.

WHEREFORE, plaintiff prays that the Court grant the

Yours, etc.

DIENST & SERRINS, LLP

By s/Joseph A. Turco, (JT 7952)

ALAN SERRINS (AS4739)

Attorneys for Plaintiff

233 Broadway -

18th Floor

New York, NY

10279

(212) 406-1700

TO : TOGO D. WEST, JR.
Acting Secretary of the Army
1941 Jefferson Davis Highway
Crystal Mall 4
Arlington, Virginia 22202-4508

Irene Chang, Esq.
U.S. Department of Justice
Assistant United States Attorney
Southern District of New
100 Church Street, 19th Floor

APPEAL FORM

Part I Apellant Identification
1. Name (last, first, middle initial)
Economou, Constantine, J.
2. Social Security Number
125-24-2159
3. Present address (number and street, city, state, and zip code) You must notify the Board of any change of address or telephone number while the appeal is pending with the MSPB.
3-24 126th Street
College Point, New York 11356
4. Home Phone (include area code)
718-463-7539
5. Office phone (include area code)

6. I certify that all of the statements made in this appeal are true, complete , and correct to the best of my knowledge and belief.
Signature of appellant or designated representative
s/Constantine J. Economou
Date Signed
14 Jan 1998

"I here by designate WILL BE PROVIDED ON A LATER DATE to serve as my representative during the course of this appeal. I understand that my representative is authorized to act on my behalf. In addition, I specifically delegate to my representative the authority to settle this appeal on my behalf. I understand that any limitation on this settlement authority must be filed in writing with the Board."

8. Representatives address (number and street, city, state, and ZIP code).

9.Representative's employer

10.a) Representative's telephone number (include area code)

10.b) Representative's facsimile number

11. Appellant's signature — Date
s/Constantine J. Economou — 14 Jan 1998

Part III Appealed Action

12. Briefly describe the agency action you wish to appeal and attach the proposal letter and decision letter. If you are appealing a decision relating to the denial of retirement benefits, attach a copy of OPM's reconsideration decision. If the relevant SF-50 or its equivalent is available, send it now; however, do NOT delay filing your appeal because of it. You may submit the SF-50 when it becomes available. Later in the proceeding, you will be afforded an opportunity to submit detailed evidence in support of your appeal.

I was removed from federal service on engineered charges.

13. Name and address of the agency that took the action you are appealing (including bureau or other divisions, as well as street address, city, state and ZIP code)
Department of the Army, Corps of Engineers
North Atlantic Division
90 Church Street New York, N.Y. 10007-2979

14. Your position title and duty station at the time of the action appealed
Chief of Construction Division
Corps of Engineers
New York District

15. Grade at time of the action appealed
Supervisory Civil Engineer GM-15

16. Salary at the time of the action appealed
$97,248 per year

17. Are you a veteran and/or entitled to the employment rights of a veteran?
Yes

18. Employment status at the time of the action appealed
Permanent
19. If retired, date of retirement (month, day, year)
I was removed on 19 Dec 1997
20. Type of service
Competitive
21. Length of government service
29 years
22. Length of service with acting agency
21 years
23. Were you serving a probationary or trial period at the time of the action appealed?
No
24. Date you received written notice of the proposed action (month, day, year) (attach a copy)
26 Aug 1997
25. Date you received the final decision notice (month, day, year) (attach a copy)
Dec 17, 1997
26. Effective date of the action appealed (month, day, year)
Dec 19, 1997
27. The agency retaliated against me for having engaged in protected EEO activity.
28. Do you believe the penalty imposed by the agency was too harsh?
Yes
29. What action would you like the Board to take on this case (i.e., what remedy are you asking for)?
Reinstate me to my original position
Payment of legal fees
Compensatory damages
30. a) Do you believe the agency committed harmful procedural error(s)?
Yes
30.b) If so, what is (are) the error(s)
See attached page #7
30.c) Explain how you were harmed by the error(s).
See attached page #7

31.a) Do you believe that the action you are appealing violated the law?
Yes
31.b) If so, what law?
Title VII of the Civil Rights Act of 1964 as amended & The Equal Employment Act of 1992 (42 U.S.C. 2000)
31.c) How was it violated?
By retaliating against the undersigned.
32.a) If you believe you were discriminated against by the agency, in connection with the matter appealed, because of your race, color, religion, sex, national origin, marital status, political affiliation, disability, or age, indicate so and explain why you believe it to be true.
Because I have been discriminated and retaliated on an on going basis.
32.b) Have you filed a formal discrimination complaint with your agency or any other agency concerning the matter which you are seeking to appeal?
Yes. At present, the case is in the precomplaint stage.
32.c) If yes, place filed (agency, number and street, city, state, and ZIP code)
EEO
NAD
90 Church Street
New York, N.Y. 10007-2979
32.d) Date filed (month, day, year)
8 Jan 1998
32.e) Has a decision been issued?
No
CONT. OF 30.b

The Agency did not allow the presence of a legal stenographer to be present at the hearing nor did they allow me to tape record the hearing.

In lieu of the case file, the Agency presented a dossier which included all my previous EEO complaints, and a complete profile of the undersigned, resembling more a police file rather than a case file. When I complained and

said this is illegal, a second file was presented which included the instant case only.

During the hearing, the deciding officer, Col. George C. Clarke, made distrustful, threatening and provocative statements against the undersigned, and did not maintain a judicial calm. The body language of Col. Clark, who on many occasions shook his head in a negative and threatening fashion.

CONT. of 30.c

The Agency sanitized and fid leafed their action during the hearing in order to make my appeal difficult.

I believe I was deprived of my rights when I was denied a verbatim transcript of the hearing.

The Dossier presented me in a false light, and I allege, had an influence on the deciding official who is a personal friend of he accusing official, Col. Thomas.

s/Constantine J. Economou
14 Jan 1998

SUBJECT: 5 February 1998 Telephone Consultation with Joseph Cohen, EEOCCRA RE: Procedural Steps in EEO Complaint Processing of AUFSFO9708h0260 and AUFSPI980110020

3. Procedural Concerns:

a. Does the agency find it mandatory to roll the new precomplaint on the removal in with the formal complaint on the proposed removal? ...That is, not to discontinue the precomplaint inquiry but to anticipate formal complaint status at its conclusion. Am I required to perceive them as one formal complaint?

b. Impacted by my decision on how to proceed will be the determination of
jurisdiction by MSPB. IF the formal complaint subsumes the precomplaint, then MSPB is correct, there is a formal complaint and they were not the first choice venue. If, the two are separate or if the removal renders the proposed removal moot, then MSPB is wrong, there was no concurrent formal EEO complaint on the removal at the time the MSPB appeal on the same subject was submitted. The necessity of counseling the complainant on his avenues of redress and verifying jurisdiction requires a clear answer.

SUPERVISORY CONTROLS

Works under the general direction of the District Engineer with wide latitude for exercising independent judgment and resourcefulness within the framework of superior's policies and departmental regulations. Assignments are made in terms of broad programs and objectives; however, policy-making and precedent-setting matters are discussed with superior to keep him advised. Review as to adequacy of work and decisions is made through discussions of the programs, discussions with using agencies, review of consolidated status reports, consultation with incumbent and other staff members, and general evaluation of progress is evaluated in terms of performance standards established by the District Engineer.

FORMAL COMPLAINT

1. NAME OF COMPLAINTANT (Last, First, Middle Initial)
   Economou Constantine J
2. SSN
   125-24-2159
3a. HOME TELEPHONE NO
   718-4630-7539
3b. WORK TELEPHONE NO

4. ADDRESS Street, City, State, and Zip Code
   3-24 126th STREET
   College Point, New York 11356
5a. ARE YOU BEING REPRESENTED
   Yes
5b. IF YES, NAME OF REPRESENTATIVE
   Alan Serrins, Esq.
   233 Broadway
   New York, NY 10279
6a. NAME OF ARMY ORGANIZATION YOU BELIEVE DISCRIMINATED AGAINST YOU
   New York District Corps of Engineers
6b. ADDRESS OF ALLEDGED DISCRIMINATION ORGINAZATION
   Jacob B. Javits Federal Bldg
   NEW YORK, NEW YORK 10278-0090
7. MAJOR ARMY COMMAND ACTIVITY YOU BELIEVE DISCRIMINATED AGAINST YOU
   US Army Corps of Engrs
8. DATE ON WHICH MOST RECENT ALLEGED DISCRIMINATION OCCURRED
   26 August 1997
9. ARE YOU WORKING FOR THE FEDERAL GOVT
   No (retired)
10. NAME OF AGENCY WHERE YOU ARE CURRENTLY EMPLOYED
   N.Y. District Corps of Engrs

11. ADDRESS OF YOUR CURRENT EMPLOYER include City, State

Jacob Javits Federal Building
New York, N.Y. 10278-0090

12a. TITLE OF YOUR CURRENT JOB

Chief of Construction

12b. PAY PLAN/SERIES/GRADE

GM 808-15

13. Reason you believe you were discriminated against (Check below).

a. RACE (State your race) →
b. COLOR (State your color) →
c. RELIGION (State your religion) →
d. NATIONAL ORIGIN (State your Nat. Origin) → X
e. HANDICAP
f. SEX
g. AGE →
h. REPRISAL / Retaliatory → X

14a. I HAVE DISCUSSED MY COMPLAINT WITH AN EEO COUNSELOR (See reverse)

Yes

14b. J. Baptiste

15.DATE OF FINAL INTERVIEW

26 Sept 1997

16.EXPLAIN SPECIFICALLY HOW YOU WERE DISCRIMINATED AGAINST

See attached pages of this complaint (pages 3-6 to 6 of 6)

17.LIST IN ITEM 20: THE NAMES OF YOUR WITNESSES AND WHAT FACTUAL INFORMATION EACH WILL BE EXPECTED TO CONTRIBUTE THROUGH HIS/HER TESTIMONY TO THE INVESTIGATION OF YOUR COMPLAINT.

18.WHAT SPECIFIC CORRECTIVE ACTION DO YOU WANT TAKEN ON YOUR COMPLAINT? (If more than one allegation is being made, write overall corrective action desired and the specific corrective action desired for each separate allegation.)

Reinstate to original position as Chief of Construction Division, Legal Fees, and Compensatory Damages

19. HAVE THE MATTERS LISTED IN ITEM 18 BEEN APPEALED TO THE MERIT SYSTEM FILED UNDER A NEGOTIATED GREIVANCE PROCEDURE?

No

20. REMARKS

I received my notice of right to file a formal EEO complaint on 26 September 1997 over the telephone (verbal). Please note, on the 26th September 1997 I was on S.L. at home.

21. Signature of Complaint

s/Constantine J. Economou PE, RA

22. DATE THIS COMPLAINT FORM WAS SIGNED BY THE COMPLAINANT (month, day, year)

4 Oct 1997

FORMAL COMPLAINT OF DISCRIMINATION
OF
CONSTANTINE J. ECONOMOU, PE, RA
CONTINUATION OF PART 16, DA FORM 2590-R

This is a formal complaint of discrimination against Togo West, Secretary United States Department of the Army, under Title VII of the Civil Rights Act of 1964 as amended, The Discrimination in Employment Act, 29 U.S.C. 6321 et Seq., and applicable EEOC directives and specifications. I allege that Col. Gary Thomas, Commander New York District Corps of Engineers, engages in overt unlawful activity against the complainant Constantine J. Economou.

BACKROUND

On 27 August 1997, I contacted an EEO Counselor, Mr. J. Baptiste who counseled me on the issues of the complaint. I became aware of this discrimination on 26 August 1997.

THE ALLEGATIONS:
ALLEGATION 1

Col. Thomas has treated and continues to treat the complainant in a disparaging and belittling manner, and subjects the complainant to abusive harassment on an on-going basis. (1)
1. Col. Thomas' disparaging treatment of the complainant perpetuates past discrimination into the present in violation of Civil Rights Act of 1964 701 et seq., U.S.C.A. 2000e seq., Ste. Marie v. Eastern RR Ass'n 458 Wade v. New York Telephone Co., 500 F. Supp 11770.

ALLEGATION 2

Col. Thomas removed the complainant from his lawful position as Chief of the Construction Division NY District

for thirty (30) days into a nonsupervisory, nonexisting fictitious position.
(2) This move was a pretext for unlawful retaliation. Therefore, the complainant was subjected to reduction in force action (RIF). This involuntary move, to remove the complainant from his regular position was taken singularly by Col. Thomas without previous discussion with the complainant. Col. Thomas, because he is an alleged discriminator, has added motivation to harm the complainant. He is fostering negative situations against the complainant in his attempt to soil the complainant's image and poison the wells in the work place.

ALLEGATION 3

Col. Thomas informed the complainant in writing on 26 Aug. 1997 that he was actively engaged to remove the complainant from service permanently. His justification is based on engineered charges which are frivolous, outrageous, preposterous and bizarre. There is a nexus between Col. Thomas' wrongful termination and alleged discriminatory acts.
2. Col. Thomas uses discretionary power to immunize himself of official violations of substantive rules as a pretext for leveling unlawful retaliation against complainant. Elimination of significant duties from an employees position can be basis for a reduction in-force action even when those duties were projected duties which an employee never actually performed. McGanely v. Vets Admin MSPB 1986, 29 M.S.P.R. 686.
Termination actions against the complainant and the complainant's three formal EEO complaints against Col. Thomas; Col. Thomas' complaint resolution by the EEOC is designed to malign the complainant and remove him from the work place. With this good and honorable character. Col. Thomas' actions are subversive injustice.

ALLEGATION 4

Col. Thomas engages in retaliatory activity against the complainant with malice and reckless indifference to the generally protected rights of the complainant. Col. Thomas has not done this to any other Division Chief except the complainant.

Col. Thomas removed the complainant's authority, as promulgated by his job description, to supervise the Area Offices of the Constructive Division. This hostile environment created by Col. Thomas has indeed caused mental stress and anguish, inconvenience, suffering and loss of enjoyment of life for the complainant.

ALLEGATION 5

Col. Thomas violated the complainant's Privacy Act Rights by making his intentions, to remove the complainant from Federal Service, known to numerous NY District and NAD supervisors and employees to the extent that it has become common knowledge in the work place.

In addition, it became known to the complainant on 26 August 1997 that his office had been wiretapped and personal calls to complainant's lawyer were monitored. No one from Col. Thomas' office had informed the undersigned that such actions were taking place. Also, the complainant was being photographed secretly and videotaped not only in his office, but also during conferences he had with others.

ALLEGATION 6

The complaint is of Greek extraction and the highest grade supervisor of Greek ethnicity in the New York District. Therefore, the retaliatory irksome activity leveled against the complainant by Col. Thomas reflects punitive and persuasive efforts to fire the only GM 15 supervisor of Greek ethnicity. Coupled with this is the fact that all recent hirings by Col. Thomas are of Anglo Saxon origins. It stands

to reason believe that there is an ethnic bias against the complainant by Col. Thomas.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

———————————————X

CONSTANTINE ECONOMOU, : 99 Civ. 12117 (AJP)

Plaintiff, :

-against- :

LOUIS CALDERA, : CIVIL JUDGMENT
SECRETARY OF THE ARMY, :

Defendant. :

———————————————X

Defendants having moved for summary judgment, and the said motion having come before the Honorable Andrew J. Peck, pursuant to 28 U.S.C. § 636(c), and on December 18, 2000 the Court having granted summary judgment for defendant on all claims except plaintiff's retaliatory denial of training claim, and the retaliatory denial of training claim having been brought on for trial on February 21, 2001 before Judge Peck and a jury, and at the conclusion of the trial the jury having returned the attached verdict for defendant, it is,

ORDERED, ADJUDGED AND DECREED: That the complaint be and hereby is dismissed.

DATED: New York, New York
February __, 2001

JAMES M. PARKISON,
Clerk of Court

Approved: February 22, 2001
S/ Andrew J. Peck
Honorable Andrew J. Peck
United States Magistrate Judge

By s/Deputy Clerk
Deputy Clerk

THIS DOCUMENT WAS ENTERED ON THE DOCKET ON FEBRUARY 23, 2001

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CONSTANTINE ECONOMOU, : 99 Civ. 12117 (AJP)

Plaintiff, :

-against- : OPINION AND ORDER

LOUIS CALDERA, JR., Secretary of the United States Department of the Army, :

Defendant. :

ANDREW J. PECK, United States Magistrate Judge:

Plaintiff Constantine Economou brings this action pursuant to Title VII, the Age Discrimination in Employment Act ("ADEA"), and the Rehabilitation Act. Economou claims that he was discriminated against due to his age (sixty-nine at the time of his termination), national origin (Greek), and disability (carpal tunnel syndrome), and retaliated against due to his prior complaints of discrimination, when he was (1) removed from employment with the United States Army Corps of Engineers (the "Army Corps" or "Army") on December 19, 1997; (2) subjected to discriminatory and retaliatory investigations during his employment; (3) denied reasonable accommodation for his disability; (4) denied training given to similarly situated supervisors; and (5) denied a performance rating in 1997 and the resulting monetary award associated with his work performance.

The parties have consented to decision of this action by a Magistrate Judge pursuant to 28 U.S.C. § 636 (c). (See Dkt. No. 8.)

The Army has move pursuant to Fed. R. Civ. P. 15 to amend its answer to assert Economou's failure to exhaust administrative remedies as an affirmative defense. The Army also has moved for summary judgment on the grounds that: (1) Economou failed to exhaust fully his administrative remedies on his discriminatory and retaliatory removal claims; (2) the investigations about which the meaning of the discrimination laws; (3) Economou was offered reasonable accommodation for his disability; (4) Economou did not exhaust his denial of training claim; and (5) Economou has not established a prima facie case of discrimination or retaliation with respect to his 1997 performance rating, and moreover, cannot establish that the Army's proffered reason for denying the performance rating was a pretext for unlawful discrimination or retaliation.

For the reasons set forth below, the Army's answer is deemed amended to assert the affirmative defense of failure to exhaust with respect to Economou's removal claim and the Army's summary judgment motion is: (1) granted on Economou's discriminatory and retaliatory investigations; (3) granted on Economou's claim that he was denied reasonable accommodation; (4) denied with respect to Economou's failure to train claim; and (5) granted on Economou's denial of performance rating claim.

Facts

Economou's Employment with the Army Corps of Engineers

Economou is a seventy-one-year-old Greek-American and trained professional engineer. (Economou & Army Exs. A:

Am. Compl. ¶¶ 7, 9;[1] Army Ex. Q: Economou Dep. At 36-37.) Economou was the Chief of the Army Corps' Construction Division in the New York District from November 5, 1992 until his termination on December 19, 1997. (Am. Compl. ¶ 10; Economou Dep. At 37.) He was responsible for supervising six unit chiefs and approximately sixty other employees. (Economou Dep. at 24-25.)

Economou's supervisor was Colonel Gary Thomas, Commander of the Army Corps' New York District. (See Economou Dep. at 27; Am. Compl. ¶ 10.) The New York District is within the Army Corps' North Atlantic Division ("NAD"), headed by Major General Milton Hunter. (Am. Compl. ¶ 13.)

During his tenure with the Army Corps, Economou filed numerous formal EEO complaints. (See Army Ex. U at 1.)

Economou's Disability and Requests for Accomodation

1. 1994 Events

Economou was diagnosed with carpal tunnel syndrome in 1992 or 1993. (Army Ex. Q: Economou Dep. at 74.) According to Economou, his first requested accommodation for his carpal tunnel in approximately May 1994 from Col. York, who was his immediate supervisor at the time. (Id. At 26, 75-76.) Economou told Col. York that he "would be able to work" but that "you have to understand I can't use the computer, the P.C. There has to be a way that we can do it without, you know, manipulating my fingers, getting me into big trouble." (Id. at 77.) Economou suggested a voice recognition program for his computer. (Id. at 78.)

Diane Deptula, Personnel Management Specialist of the Human Resources Department, Army Corps, New York

[1] References to "Army Ex." And "Economou Ex." refer to the exhibits attached to the 9/1/00 Declaration of Assistant United States Attorney Ramon Reyes, Jr. and the 9/14/00 Declaration of Economou's counsel Joseph A. Turco, respectively.

District, stated that in response to a June 17, 1994 injury compensation claim by Economou, Economou was placed on extended paid medical leave from June 9, 1994 to June 25, 1995. (See 9/22/00 Deptula Aff. ¶¶ 1-2.)

It is undisputed that Economou did not again request accommodation until September 1997, and then did so at his lawyer's suggestion. (9/22/00 Deptula Aff.. ¶ 3; Army Ex. Q: Economou Dep. at 78-79, 116-17.)

2. 1997 Events

The undisputed evidence shows that on September 8, 1997, at approxiamately 8:15 a.m., Eocnomou submitted an Application for Leave from September 2 October 8, 1997 to Major John D. Lock, Deputy Commander of Military Programs. (See Army Ex. H at 1-2: 9/8/97 Lock Memorandum ¶ 1; Army Ex. H at 4-6: 9/8/00 Economou Application for Leave.) Economou's Application for Leave was accompanied by notes from two doctors, Dr. Nicholas Roditis and Dr. Donald Holzer. (Army Ex. H at 5-6.) Dr. Roditis wrote that Economou was being treated for bilateral carpal tunnel syndrome and that it was recommended that he "refrain from excessive computer use." (Id. at 5.) Dr. Holzer wrote that Economou was under his care for carpal tunnel syndrome and that due "to permanent nerve damage to both hands he is not able to use his hands for computer operations [and] is totally disabled until October 8, 1997." (Id. at 6.)

According to Major Lock, after conferring with the Human Resources Department, he informed Economou that his Application for Leave was denied, since carpal tunnel syndrome did not require absence from work. (See Army Ex. H: Lock Mem. ¶¶ 4,6, 8-9.) Rather, Major Lock informed Economou that the Army Corps would provide Economou with accommodations for his carpal tunnel syndrome which would enable him to work, i.e., "a secretary could be made available to him to type or write, word recognition software could be purchased allowing him to 'speak' to his computer

which would do the typing, or a tape recorder could be provided and his notes transcribed by a secretary." (Id.¶¶ 6, 9.) Major Lock informed Economou that he could not approve his request for sick leave on the information Economou had provided but that "[i]f he were to obtain more specific details from his physician, [Lock] would reconsider his request." (Id. ¶ 9.) Major Lock informed Col. Thomas of his decision to deny sick leave, and Col. Thomas concurred. (Id. ¶ 9.) Major Lock informed Col. Thomas of his decision to deny sick leave, and Col. Thomas concurred. (Id. ¶ 13.)

Economou subsequently submitted a September 8, 1997 letter from Dr. Roditis stating that Economou was "treated for Bilateral Carpal Tunnel Syndrome from September 2-5, 1997. He was totally incapitated and was advised to rest , take the medication and not to report to work for the period inidicated." (Army Ex. I: 9/8/97 Dr. Roditis Letter.)

On September 17, 1997, Col. Thomas requested that Dr. Holzer provide "more specific medical documentation" regarding Economou's carpal tunnel syndrome and its effects on his ability to work. (Army Ex. J: 9/17/97 Thomas Letter to Dr. Holzer.) Col. Thomas noted that on September 9, 1997, Economou had "submitted another statement which was added to your original note which states: 'Because Mr. Economou is under medication, he is not allowed to be physically in the work place for the duration indicated above.'" (Id.) Col. Thomas noted that it was the Army Corps' policy to return employees to light duty or regular duty upon an employee's partial recovery and ability to perform limited duties. (Id.) Col. Thomas provided Economou's job description and informed Dr. Holzer that Economou could utilize the services of a Management Support Assistant and Secretary to assist him and that Economou did "not need to operate a computer" to carry out his duties. (Id.)

On October 14, 1997, Economou submitted a second Application for Leave, this time seeking leave from October 14 to November 15, 1997. (Army Ex. K: 10/14/97 Request for Leave.) Accompanying the application was the same

September 5, 1997 letter from Dr. Holzer that Economou had submitted with his first application indicating that Economou was "totally disabled until October 8, 1997" but containing an additional paragraph (presumably the September 9 statement referred to above), stating: "Because Mr. Economou is under medication, he is not allowed to be physically in the workplace for the duration indicated above." (Id. at 3.)

On October 23, 1997, Col. Thomas again wrote to Dr. Holzer requesting "additional medical documentation for Mr. Constantine Economou." (Army Ex. L: 10/23/97 Thomas Letter to Dr. Holzer.) Col. Thomas noted that Economou submitted a second letter from Dr. Holzer which stated that: Economou was under his care for carpal tunnel syndrome; "[d]ue to permanent nerve damage on both hands for computer operations"; Economou "is totally disabled until November 15, 1997"; and "[b]ecause Mr. Economou is under medication, he is not allowed to be physically in the workplace for the duration indicated." (Id.) Col. Thomas again informed Dr. Holzer that Economou's carpal tunnel syndrome "can easily be accommodated and he will not have to operate a computer." (Id.) Finally, Col. Thomas asked Dr. Holzer to "be specific about what medication Mr. Economou is taking that precludes him from performing the duties of the position which his is currently detailed" and to provide information to that effect by October 31, 1997. (Id.)

On November 15, 1997, Economou faxed to Col. Thomas another note from Dr. Holzer and an Application for Leave from November 17 to December 10, 1997. (Army Ex. M: 11/15/97 Request for Leave from November 17 to December 10, 1997. (Army Ex. M: 11/15/97 Request for Leave.) Dr. Holzer's note is virtually identical to the two prior notes, except with respect to the date through which Economou was totally disabled - December 10, 1997. (Id. at 2)

On November 24, 1997, Col. Thomas wrote Dr. Holzer a third letter in which he again requested additional medical documentation. (Army Ex. N: 11/24/97 Thomas Letter to

Dr. Holzer.) Once again, Col. Thomas informed Dr. Holzer that Economou's condition "can easily be accommodated and he will not have to operate a computer." (Id.) Again, Col. Thomas asked Dr. Holzer to "be specific about what medication Mr. Economou is taking that precludes him from performing the duties of the position to which he is currently detailed" and provide information to that effect by November 28, 1997. (Id.) There is no indication that any such information was provided. Economou did, however, send a December 5, 1997 letter to the Chief of Human Resources, requesting that an attached December 1, 1997 medical statement from Dr. Holzer - asserting that "Mr. Constantine Economou has permanent nerve damage in both hands due to Carpal Tunnel Syndrome. He is permanently handicapped and is not allowed to work on any computer (key boards) that involves the use of his hands" - be "entered permanently in my official Personnel File." (Army Ex. O: 12/5/97 Economou Letter to Chief of Human Resources.)

Col. Thomas's Alleged Denial of Economou's Requests for Training

Economou testified that in 1996, on the morning before he was scheduled to take a leadership course which all other division chiefs attended, the course coordinator e-mailed him that Col. Thomas had deleted his name from the list of authorized attendees. (Army Ex. Q: Economou Dep. at 80-81, 86.) Economou called Col. Thomas, who told Economou that "he was saving money that he needed"; Economou complained that not going to the course "disadvantaged [his] his promotional abilities,' to which Col. Thomas responded "you can't go any higher from where you are." (Id. at 81-82)

Economou testified that in "[t]he beginning of '97" Col. Thomas did not approve Economou's request to attend a management course. (Id. at 83-84)[2]

Alleged Investigations of Economou

Col. Thomas testified that in summer of 1996, it came to his attention that there were individuals within the District who had relatives working within their chain of command. (Army Ex. T: Thomas Dep. at 85-87.) As a result, Col. Thomas "established a policy for the next year that the district would take great pains not to have that problem [i.e., nepotism] reoccur." (Id. at 87.) However, , "[a]s the summer hiring began for the summer hire program for the next year, it came to [Col. Thomas']s attention that a number of the managers in the district were not following [his] guidance and... were either intervening or giving the appearance of intervening in the hiring of their children." (Id.) Col. Thomas believed that Economou was one of those managers. (Id. at 87-88.) Col. Thomas requested that an officer from outside the District be appointed to investigate the 1997 summer hire program. (Id. at 88, 99; Army Ex. R: 6/10/97 Memorandum of Appointment.) Economou testified that he was not disciplined, demoted or reprimanded in any way as a result of the Summer Hire Program investigation, but that he was "maligned." (Army Ex. Q.: Economou Dep. at 53-54.)

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[2] Col. Thomas testified that the only training he recalled Economou specifically requesting was the District's LEAD (Leadership, Education AND Development) Course. (Army Ex. I: Thomas Dep. at 30.) According to Col. Thomas, he told Economou that the course was designed for "fairly junior employees"-i.e., "sort of mid-grade people who might be coming into a leadership or supervisory position for the first time in their career"-and, as such, was inappropriate for Economou who was "the highest-ranking civilian individual that we had in the district." (Id. at 30-31.) Col. Thomas claims that he recommended Economou take a higher level course called Organizational Management for Executives and that he "would be glad to send him to that course instead." (Id. at 31; see also id at 74-77; Economou Ex. Q: Thomas Resp. to Interrog. No. 22(i).)

Economou also complains about what he called a "lot of secret investigations that [he] was never privy to." (Economou Dep. at 50-53.) Economou testified that in April or May 1997, Col. Thomas told Economou that he was being investigated. (Id. at 52-53.) When asked whether he knew the results of those investigations, Economou replied, " I don't, that's why I call them secret." (Id. at 53.) When asked whether any actions were taken against him as a result of these investigations, Economou replied that Col. Thomas "took actions which were very peculiar in itself. For instance, he would not talk to me, he would not acknowledge me in the presence of other supervisors... He would ignore me [and r]efuse to see me in an office on regular business." (Economou Dep. at 58.) In addition, Col. Thomas sent Economou e-mails which Economou described as "in itself demeaning." (Id.) There is no evidence in the record as to the contents of those e-mails.

In addition, Economou complains that Col. Thomas "directed [Economou] to have a sign-in and sign-out book" (Economou Dep. at 54), and

> [W]hat he would do, Colonel Thomas, he would come in at the time around 7:30 a.m.... he would come in before that, and check to see when did I sign it, what time did I sign in. He did that over and over to the extent that my employees started asking questions, what is going on. Then he would ask my secretary where is he and oftentimes the secretary told him he is inside or he is in the men's room or wherever I was or talking to this individual. He would write down notes and kept going on and on and on.

(Id. at 55)

According to Economou, Col. Thomas' scrutiny of his comings and goings started in 1996 and continued for at least a year. (Economou Dep. at 57.) When asked whether

Col. Thomas took any action against him "as a result of his...investigation of, when you came in and when you left and where you were," Economou replied "No." (Id.)

Finally, Economou complains of self-investigations he was required to conduct:

> [W]hen a project was complete [Col. Thomas and General Hunter] would require me to run an investigation to see why it took so many days to complete. Every time there was an accident on the job, they required me to have a whole investigation so this investigation was an ongoing basis. The purpose of this investigation was to portray an idea to everybody that upper management had something against me in the bureaucracy, it translated.

(Economou Dep. at 4-45.) Economou was unable to do provide specifics regarding these self-investigations (id. at 45-46) and there is no additional mention of them in the parties' briefs. (See Army Reply Br. At 6.)

Economou's Removal from the Army Corps

On December 19, 1997, Economou was removed from employment with the Army Corps. (See Army & Economou Ex. B: 12/17/97 Army Corps Notice of Decision.) The reason given for Economou's removal was that he made false and fraudulent statements, i.e., overstated and altered receipts for taxi expenses, on three travel reimbursement vouchers in July 1996, October 1996 and June 1997. (See id. ¶¶ 2, 3, 6, 9, 14, 18, 24.)

Col. Thomas testified that "[a]s the approving official for the travel vouchers for the senior managers, either myself or Colonel Hough would review them for general compliance with form and the nature of the travel to make sure that it had been conducted properly before approving them for - so the individuals could be paid." (Army Ex. T: Thomas Dep. at

51-52.) Col. Thomas testified that there were three things that stood out in Economou's secretary explaining why Economou had stayed at a hotel different than the conference hotel; and (3) "it was pretty apparent that some or most of [the taxi receipts] had been doctored." (Id. at 52.)

Col. Thomas denied paying any special attention to Economou's EEO complaints and stated that he reviewed his subordinates' submissions with equal scrutiny but that "when there's two different colors of ink on a taxi receipt with the dollar amounts, that's not a subtle finding. That stands out." (Id. at 53)

After discovering the alleged irregularities on July 1, 1997, Col. Thomas contacted Gary L. Kehoe, the Division's Chief of Security and Law Enforcement. (See id. at 56; Army Ex. V: 8/20/97 Kehoe Memorandum at 1.) On August 20, 1997, Kehoe issued a memorandum to the "Commander, New York District," outlining an investigation of Economou's conduct. (See army Ex. V: Kehoe Mem.)

On August 26, 1997 Col. Thomas issued a "Proposed Removal" notice to Economou based on the above-described conduct. (See Army Ex C: 8/26/97 Proposed Removal.) Economou was temporarily relieved of his duties and detailed as the Special Assistant to the Deputy Commander, Military Works. (Id. ¶ 6.) Economou was offered the opportunity to make a written and/or oral reply to the charges in the Proposed Removal, and to review the investigation materials on which the Proposed Removal was based. (Id. ¶ 7; Army Ex. B: 12/17/97 Notice of Decision ¶ 2.) On October 10, 1997, Economou and his attorney Alan Serrins made an oral response to the deciding official – Colonel George Clarke, NAD Deputy Commander – in which Economou offered an explanation for each of the alleged irregularities. (Army Ex. D: Memorandum for Record summarizing 10/10/97 oral presentation.) A memorandum summarizing the oral presentation was provided to Serrins on or about November 19, 1997. (Id. at 5.)

On December 17, 1997, Col. Clarke determined that Economou had "misrepresented the amounts of taxi fares on the three vouchers identified in the District's proposal letter" and that Economou should be removed from the Army Corps. (Army Ex. B: 12/27/97 Notice of Decision ¶¶ 2, 24-25.) Col. Clarke balanced Economou's twenty-nine years of satisfactory service to the Army Corps and the absence of past discipline with (1) the nature and seriousness of Economou's misconduct; (2) his high level within the Army Corps; (3) the lack of trust and confidence his misconduct created within the Army Corps; (4) the Army's discipline policy and Table of Penalties; and (5) the lack of potential for Economou's rehabilitation and found that removal was appropriate. (Id. ¶ 25)

The Notice of Decision advised Economou about his appeal right as follows:

> 26. You may appeal under statutory appellate procedures by filing a notice of appeal, in writing, to the Merit Systems Protection Board.... Any appeal must be filed during the period beginning with the day after the effective date of the action but no later than thirty (30) days after the effective date. An appeal to the Merit Systems Protection Board must be in writing and state the reasons for contesting this action. If you appeal, the Merit Systems Protection Board will review the decision and all findings in connection with the removal and a copy of the Boards appeal form is attached to this letter.
>
> 27. If you believe this action is discriminatory, based on your race, religion, color, sex, age, national origin, physical or mental handicap, you have the right to seek assistance from the New York District Equal Opportunity Office (EEO).... The EEO staff will explain the procedures of the EEO Program and your rights.

(Id. ¶¶ 26-27.)

Economou was terminated effective December 19, 1997. (Id. ¶ 2.)

Economou Was Not Given A 1996-97 Performance Rating

Prior to his removal, Economou's annual performance evaluation for 1996-97 came due. (See, e.g., Army Ex. T: Thomas Dep. at 37; Economou Ex. Q: Thomas Resp. to Interrog. No. 22(f).) According to Col. Thomas, he did not evaluate Economou for the 1996-97 period because in September-October 1997, Amy Cardone, the Chief of Human Resources, "advised [him] that there was no requirement to do a performance appraisal on someone who is being proposed for removal." (Thomas Dep. at 37-38, 40; see Thomas Resp. to Interrog. No. 22(f).)

Economou's 1997-98 Agency EEO Complaints

1. February 2, 1997 Formal EEO Complaint

On February 2, 1997, Economou filed a formal agency EEO complaint alleging retaliation. (See Economou Ex. P: 2/2/97 EEO Compl.) Specifically, Economou challenged the process by which he and the supervisors working under him had been evaluated during the 1995-1996 rating period, alleged that he was denied training given to similarly situated employees and that he was unfairly denied performance awards. (Id. at 4-5)

2. August 11, 1997 Formal EEO Complaints

On August 11, 1997, Economou filed two formal agency EEO complaints. (See Army Ex. A: Am. Compl. Exs. A and C.) In the first, Economou alleged that Maj. Gen. Hunter retaliated against him for his prior EEO activity when he "leveled

premeditated procurement of investigations against [Economou] in order to malign, tarnish, and undermine [Economou's] reputation." (Am. Compl. Ex. A at 3.) In the second, Economou alleged that Col. Thomas retaliated against him when he (1) "initiated improper exercise of influence against [Economou]" by collaborating with Maj. Gen. Hunter to "promote intentional and premeditated affliction [sic] of emotional distress against [Economou]"; (2) leveled premeditated procurement of investigations against [Economou], in order to malign and tarnish [Economou's] reputation""; and (3) "interfere[d] on an ongoing basis with [Economou's] supervisory duties and authorities as specified in his job description, and ha[d] literally stripped [Economou] of [his] supervisory authority to supervise his subordinates." (Am. Compl. Ex. C at 3-4.)

3. October 4, 1997 Formal EEO Complaint

On October 4, 1997, Economou filed a formal agency EEO complaint of national origin discrimination and retaliation for his prior EEO activity, complaining of: (1) "disparaging and belittling" treatment and harassment by Col. Thomas; (2) Economou's reassignment to a non-supervisory position with unspecified duties; (3) his proposed removal; (4) the removal of his authority to supervise Area Offices of the Construction Division; (5) improper surveillance; and (6) discrimination because he is Greek. (Economou Ex. M: 10/4/97 EEO Compl.)

4. Economou's Informal Communications with the EEO in Early January 1998

Economou alleges that:

> On January 7, 1998, I telephoned Joanne Close, EEO Manager of the North Atlantic Division indicating that I was forwarding a request for an EEO counselor to conduct a new inquiry into a

retaliatory charge I was filing stemming from my removal from my position effective December 19, 1997. The following day, Ms. Close received my complaint which identified two primary issues, the removal and the alleged failure to provide reasonable accommodation for my disability - Carpal Tunnel Syndrome.

(9/14/00 Economou Aff. ¶ 7.)

Economou sent a certified letter (which he also faxed) to Close dated January 8, 1998, which reads:

SUBJECT: REQUEST FOR ASSIGNMENT OF EEO COUNSELOR.

Dear Ms. Close:

In accordance with our telephone conversation of 7 January 1998, I wish to be assigned an EEO counselor, to counsel me on the EEO precomplaint given below. During our telephone conversation you advised me to submit my EEO precomplaint to you and you were to provide me with a counselor after consulting with a higher authority.

Allegation 1: On 19 December 1997, I was wrongfully terminated from Federal employment on pretextural charges leveled against me by Col Gary Thomas, Commander N.Y. District Corps of Engineers and my immediate supervisor, in collaboration with Col George Clarke, Deputy Commander NAD. I allege, this action was in retaliation for having previously engaged in protected EEO activity. I became reasonably aware of this on 8 December 1997.

Allegation 2: Col Thomas has denied my 1997 performance rating (TAPES) and as a result he

has denied my performance award for the same period. I have received disparate treatment as compared with similarly situated New York District employees in retaliation for having been engaged in EEO protected activity. I became reasonably aware of this on 15 December 1997.

Allegation 3: I have been denied reasonable accommodation in the place for being handicapped, in violation of the Americans with Disabilities Act, as a means of retaliation for having been engaged in EEO protected activity. I became reasonably aware of this on 15 December 1997.

In conclusion:

- I have been wrongfully discharged from Federal employment in retaliation for having previously engaged in EEO protected activity.
- I have been denied my performance evaluation and performance award for the rating period June 1996-1997 in retaliation for my previous EEO activity.
- I have been denied reasonable accommodation for being handicap as a means of retaliation for my previous EEO activity.

(Army Ex. P, emphasis added.)

5. March 5, 1998 Formal EEO Complaint

On March 5, 1998, Economou filed another agency EEO complaint, alleging that he had been discriminated against based on his national origin (Greek), physical disability (carpal tunnel syndrome), and age (sixty-nine) and that he had been retaliated against because of his prior EEO activity. (Economou Ex. 1.) Specifically, Economou complained of three separate incidents of alleged discrimination and retaliaton: (1) on December 19, 1997, retaliation when he "was wrongfully terminated from Federal employment on

pretextural charges leveled against [him] by Col. Thomas... and [his] immediate supervisor, in collaboration with Col. George Clarke, Deputy Commander NAD"; (2) retaliation when Col. Thomas denied him his 1997 performance rating and the resulting performance award; and (3) the denial of reasonable accommodation for his alleged disability. (Id. 4.)

Economou's Merit Systems Protection for his alleged disability.

On January 14, 1998, Economou filed a "mixed case" appeal to the Merit Systems Protection Board ("MSPB"),[3] Challenging his removal from the Army Corps. (Economou Ex. D: MSPB Appeal; see Economou & Army 56.1 Stmts. ¶ 1.) In his mixed-case appeal, Economou alleged that the Army Corps committed harmful procedural errors related to the oral presentation to Col. Clarke, namely: (1) not allowing a stenographer to record the proceeding: (2) presenting him with a dossier which included all his prior EEO complaints, and a complete "profile" of him, which resembled "more a police file rather than a case file"; and (3) Col. Clarke "made distrustful, threatening and provocative statements against [Economou], and did not maintain a judicial calm." (MSPB

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[3] Under the Civil Reform Act ("CSRA"), the MSPB is authorized to review adverse employment actions which fall into one of five categories: a removal, a suspension for more than 14 days, a reduction in Grade, a reduction in pay or a furlough of 30 days or less. 5 U.S.C. § 7512(1)-(5); 5 C.F.R. § 1201.3. The Board also has pendent jurisdiction over...

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...discrimination claims brought in connection with an adverse action reviewable by it, i.e. it has jurisdiction over so-called "mixed case appeals." 5 U.S.C. § 7702(a)(1); 29 C.F.R. § 1614.302. The Court of Appeals for the Federal Circuit has exclusive jurisdiction over all final orders and decisions of the MSPB, except for final orders with respect to "mixed case appeals," over which the federal district courts have exclusive jurisdiction. See, e.g., Downey v. Runyon, 160 F.3d 139, 143-44 & n.1 (2d Cir. 1999); 5 U.S.C. § 7703(b).

Appeal ¶ 30(b); see Army & Economou 56.1 Stmts. ¶ 2.) Economou also claimed that his removal violated Title VII because it was in retaliation for his prior EEO activity. (MSPB Appeal ¶¶ 27, 31 (b); see Army & Economou 56.1 ¶ 3.)

On the application form, Economou answered yes to the question "Have you filed a formal discrimination complaint with your agency or any other agency concerning the matter which you are seeking to appeal?" and indicated the agency EEO as the "place filed" and January 8, 1998 as the "date filed," but also indicated that "at present, the case is in the precomplaint stage." (MSPB Appeal ¶ 32 (b)-(c).)

On January 20, 1998, the MSPB issued an Order to Show Cause noting that it "may not have jurisdiction to decide [Economou's] appeal at this time." (Economou Ex. E: 1/20/98 Order to Show Cause at 1.) The MSPB explained that "when an appellant has previously filed a formal discrimination complaint concerning the identical matter appealed to the Board, the petition to the Board is premature until either thirty days after resolution of the discrimination complaint or 120 days after the filing of the complaint." (Id.) The MSPB stated "when an appellant has previously filed a formal discrimination complaint concerning the identical matter appealed to the Board, the petition to the Board is premature until either thirty days after resolution of the discrimination complaint or 120 days after the filing of the complaint." (Id.) The MSPB stated that Economou bore the burden of proving that the MSPB had jurisdiction over the mixed case appeal and ordered him "to file evidence and argument to prove that this action is within the Board's jurisdiction... within 15 calendar days of the date of [the] Order." (Id.at 2.)

On February 10, 1998, Economou replied to the Order to Show Cause:

[P]lease be advised that I concur with your opinions regarding my appeal case.

Presently, I am pursuing this case through the EEOC avenue. I may, after resolution of this case by the EEOC, return to the U.S. MSPB for action.
(Economou Ex. F: 2/10/98 Reply to Order to Show Cause.)

On March 2, 1998, MSPB administrative Law Judge ("ALJ") Farnes issued an Order stating that after receipt of Economou's February 10 submission, the Army Corps had informed the MSPB that Economou's January 8, 1998 EEO complaint only was an informal complaint and that "[i]t is unclear whether the appellant [Economou] has since filed a formal discrimination complaint, or whether the appellant wishes to have his appeal dismissed without prejudice pending his pursuit of a complaint with EEO"; the MSPB scheduled a telephone conference to resolve the matter. (See Economou Ex. G: 3/3/98 MSPB Order at 1.)

Economou submitted a March 6, 1998 letter, stamped received by the MSPB on March 10, 1998:

> As directed by Administrative Judge Milagros Farnes during the tele-conference of 6 March 1998, I submit two enclosures (Exhibits 1 and 2) of two formal EEO formal [sic] complaints; Exhibit 1 contains my formal EEO complaint dated 4 October 1997 and Exhibit 2 contains my formal complaint of 5 March 1998, as evidence of having filed formal EEO complaints.
>
> Because I allege, that I was wrongfully terminated from federal service as retaliation for having been engaged in protected EEO activity as stated in the two exhibits, it is my wish to stay with the EEO process.

(Economou Ex. J: 3/6/98 Letter)

On April 1, 1998, the MSPB issued an Initial Decision on Economou's "mixed case" appeal. (See Economou Ex. K: 4/1/98 MSPB Initial Decision.) The MSPB ruled that it had jurisdiction over the appeal. (Id. at 1.) It further noted that

"[d]uring a telephonic conference held on April 1, 1998, [Economou] informed [the MSPB] that he was withdrawing his appeal... Therefore, because the appeal has been withdrawn, the matter is dismissed from further consideration." (Id.) The Initial Decision became final on May 6, 1998. (Id. at 2.)

The Army's Decision with Respect to Economou's October 4, 1997 EEO Complaint and Economou's EEOC Appeal

By decision dated February 19, 1998, the Army EEO found that allegation 2 of Economou's October 4, 1997 complaint (reassignment to a non-supervisor position with unspecified duties) was an integral part of the proposed removal action (allegation 3) and dismissed allegations 2 and 3 on the ground that they would be investigated in a subsequently filed complaint regarding Economou's removal. (See Economou Ex. H: 3/8/99 EEOC Appeal Decision at 1)[4] In addition, the Army dismissed allegations 1, 4 and 5 (complaining of "disparaging and belittling" treatment by Col. Thomas, the removal of Economou's authority to supervise Area Offices of the Construction Division, and improper surveillance, respectively) on the grounds that they were not raised with the EEO counselor and that they lacked specificity even though the agency had requested additional information from Economou's attorney. (See id.)

Economou appealed to the EEOC and by decision dated May 28, 1999, the EEOC reinstated allegations 1, 4 and 5, finding that the Army's dismissal was not supported by the record, and reinstated allegation 2, finding that it could not be determined prior to an investigation whether allegation 2 was "part and parcel" of the proposed removal. (Id. at 2-3.) The EEOC further found that the Army should combine

[4] A copy of the Army EEO decision is not included in the record before the Court, but is summarized in the EEOC decision on appeal, Economou Ex. H.

allegations 2 and 4 if, upon investigation, it determined that they referred to the same agency action. (Id. at 3.) Finally, the EEOC affirmed the Army's dismissal of allegation 3 finding that "the agency correctly treated the appellant's proposed removal as subsumed in the removal action that is the subject of a separate complaint." (Id.)

The Present Federal Lawsuit

Economou filed the present action in this court on December 17, 1999. (Dkt. No.1.) On April 14, 2000 he filed an amended complaint (Dkt. No. 6 & Economou Ex. A: Am. Compl.), alleging that he was discriminated against based on his national origin (Greek), age (sixty-nine at the time) and disability (carpal tunnel syndrome) and was retaliated against because of his prior EEO activity when: (1) his employment with the Army Corps was terminated on December 19, 1997 (Am. Compl. ¶¶ 10-12) (2) he was subjected to discriminatory and retaliatory "investigations" during his employment with the Army Corps (id. ¶ 13); (3) he was denied reasonable accommodation for his disability (id. ¶ 14); (4) he was denied training given to similarly situated supervisors (id. ¶ 15); and (5) he was denied a performance rating in 1997 and the alleged resulting monetary award associated with his work performance (id. ¶ 16). The Amended Complaint asserted claims under Title VII (id. ¶¶ 18-19), the ADEA (id. ¶¶ 20-21), and the Rehabilitation Act (id. ¶¶ 22-23.)

The Army answered the amended complaint on May 17, 2000, without raising an affirmative defense of failure to exhaust administrative remedies. (Dkt. No. 7, & Army Ex. W.) The Army, however, raised the defense at the May 30, 2000 status conference. (Dkt. No. 9 & Economou Ex. L: 5/30/00 Conf. Tr. At 4-5.) The Army also referred to the defense in a letter Economou's counsel on May 31, 2000. (Army Ex. Y: 5/31/00 Letter from AUSA Ramon Reyes to Joseph Turco.) The Army raised the defense in its August 11, 2000 premotion letter to the Court. (Army Ex. Z: 8/11/00

Pre-Motion Letter.) On August 30, 2000, Economou's counsel informed the Army that pursuant to Rule 8(c) of the Federal Rules of Civil Procedure, he objected to the Army's reliance on the defense in support of its motion for summary judgment because the Army had not raised it in its answer. (See Army Ex. AA.)[5] The Army's present motion to amend its answer and for summary judgment followed. (Dkt. Nos. 15-20.)

ANALYSIS

I. SUMMARY JUDGMENT STANDARDS IN EMPLOYMENT DISCRIMINATION CASES

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the

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[5] That letter states as follows:

> In anticipation of the Army's forthcoming Motion for Summary Judgment, and pursuant to our August 30, 2000 telephone conversation and other conversations we had last month, I would like to bring to your attention Fed. R. Civ. P. 8(c) which states that a responsive pleading "shall set forth...any...matter constituting an avoidance or affirmative defense." You may or may not have realized that a motion for summary judgment brought on grounds that the plaintiff has failed to exhaust his administrative remedies is not of a jurisdictional nature. Thus, such an affirmative defense would necessarily have to be preserved in a responsive pleading or is waived. Since the Army has failed to preserve this affirmation defense in its Answer, it is, therefore, precluded from a summary judgment motion based on such a defense.
>
> A proper motion to be made would be to move the court to amend the Army's Answer to include a new affirmative defense, not a motion for summary judgment on a waived affirmative defense; the Army has not made such a motion. By means of this correspondence, I hereby put you on notice that to make such an improper motion may be in violation of Fed. R. Civ. P. 11.

affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); see also, e.g., Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247, 106 S. Ct. 2505, 2509-10 (1986); Lang v. Retirement Living Pub. Co., 949 F.2d 576, 580 (2d Cir. 1991).[6]

The burden of showing that no genuine factual dispute exists rests on the party seeking summary judgment - here, defendants. See, e.g., Adickes v. S.H. Kress & Co., 398 U.S. 144, 157, 90 S. Ct. 1598, 1608 (1970); Chambers v. TRM Copy Ctrs. Corp., 43 F. 3d 29, 36 (2d Cir. 1994); Gallo v. Prudential Residential Servs., Ltd. Partnership, 22 F. 3d 1219, 1223 (2d Cir. 1994)[7] The movant may discharge this burden by demonstrating to the Court that there is an absence of evidence to support the non-moving party's case on an issue on which the non-movant has the burden of proof. See, e.g., elotex Corp. v. Catrett, 477 U.S. at 323, 106 S. Ct. at 2552-53.[8]

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[6] See also, e.g. Weinstock v. Columbia Univ., 224 F.3d 33, 41 (2d Cir. 2000); Cobian v. New York City, 99 Civ. 10533, 2000 WL 1782744 at *7 (S.D.N.Y. Dec. 6, 2000) (Peck, M.J.); Austin v. Ford Models, Inc., 95 Civ. 3731, 2000 WL 1752966 at *6 (S.D.N.Y. Nov. 29, 2000) (Peck, M.J.); Johns-Davila v. City of New York, 99 Civ. 1885, 2000 WL 1725418 at *3 (S.D.N.Y. Nov. 20, 2000) (Peck, M.J.); Carbonell v. Goord, 99 Civ. 3208, 2000 WL 760751 at *4 (S.D.N.Y. June 13, 2000) (Peck, M.J.); Greenfield v. City of New York, 99 City of New York, Civ. 2330, 2000WL 124992 at *3 (S.D.N.Y. Jan. 23, 1997) (Peck, M.J.); Weber v. Parfums Givenchy, Inc., 49F. Supp. 2d 343, 352 (S.D.N.Y. 1999) (Wood, D.J. & Peck, M.J.); Douglas v. Victor Capital Group, 21 F. Supp. 2d 379, 387 (S.D.N.Y. 1998) (Stein, D.J. & Peck, M.J.); Hernandez v. New York City Law Dep't Corp. Counsel, 94 Civ. 9042, 1997 WL 27047 at *6 (S.D.N.Y. Jan. 23. 1997) (Peck, M.J.)

[7] See also, e.g., Cobian v. New York City, 2000 WL 1782744 at *7; Austin v. Ford Models. Inc., 2000 WL 1752966 at *6; Johns-Davila v. City of New York, 2000 WL 124992 at *3; Weber v. Parfums Givenchy, Inc., 49 F. Supp. 2d at 352; Douglas v. Victor Capital Group, 21 F. Supp. 2d at 387; Hernandez v. New York City Law Dep't, 1997 WL 27047 at *6.

[8] See also, e.g., Cobian v. New York City, 2000 WL 1782744 at *7; Austin v. Ford Models,Inc.,2000WL 1752966 at *6; Johns-Davila v. City of New York, 2000WL 1725418 at *3; Carbonell v. Goord, 2000WL 760751 at *4.

To defeat a summary judgment motion, the non-moving party must do "more than simply show that there is some metaphysical doubt as to material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S. Ct. 1348, 1356 (1986).[9] Instead, the non-moving party must "set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); accord, e.g., Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. at 587, 106 S. Ct. at 1356[10]

In evaluating the record to determine whether there is a genuine issue as to any material fact, "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." Anderson v. Liberty Lobby, 477 U.S. at 255, 106 S. Ct. at 2513.[11] The Court draws all inferences in favor of the nonmoving party only after determining that such inferences are reasonable, considering all the evidence presented. See, e.g., Apex Oil Co. v. DiMauro, 822 F.2d 246, 363 (2d Cir.), cert. denied, 484 U.S.

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[9] See also, e.g., Cobian v. New York City, 2000 WL 1782744 at *7; Austin v. Ford Models, Inc., 2000 WL 1752966 at *6; Johns-Dasilva v. City of New York, 2000WL 1725418 at *3; Carbonell v. Goord, 2000 WL 760751 at *4.

[10] See also e.g., Weinstock v. Columbia Univ., 224 F.3d at 41 (At summary judgment, "[t]he time has come...'to put up or shut up'");Cobian v. New York City, 2000 WL 1782744 at *7; Austin v. Ford Models, Incl., 2000WL 1752966 at *6 ; Johns-Davila v. City of New York, 2000 WL 1725418 at *3; Carbonell v. Goord, 2000 WL 760751 at *4.

[11] See also e.g., Chambers v. TRM, 43 F. 3d at 36: Gallo v. Prudential, 22 F. 3d at 1223; Cobian v. New York City, 2000 WL 1782744 at *7; Austin v. Ford Models Inc., 2000 WL 1752966 at *7; Johns-Davila v. City of New York, 2000 WL 1725418 at *3; Carbonell v. Goord, 2000WL 760751 at *4; Greenfield v. City of New York, 2000 WL 124992 at *4; Weber v. Parfums Givenchy, Inc., 49 F. Supp. 2d at 353; Douglas v. Victor Capital Group, 21 F. Supp. 2d at 387; Hernandez v. New York City Law Dep't 1997 WL 27047 at *6.

977, 108 S. Ct. 489(1987).[12] "If, as to the issue on which summary judgment is sought, there is any evidence in the record from any source from which a reasonable inference could be drawn in favor of the nonmoving party, summary judgment is improper." Chamber's v. TRM, 43 F.3d at 37.[13]

In considering a motion for summary judgment, the Court is not to resolve contested issues of fact, but rather is to determine whether there exists any disputed issue of material fact. See, e.g., Donahue v. Windsor Locks Bd. Of Fire Comm'rs, 834 F. 2d 54, 58 (2d Cir. 1987); Knight v. United States Fire Ins. Co., 804 F. 2d 9, 11 (2d Cir. 1986), cert. denied, 480 U.S. 932, 1907 S. Ct. 1570 (1987).[14] To evaluate a fact's materiality, the substantive law determines which facts are critical and which facts are irrelevant. See, e.g., Anderson v. Liberty Lobby, 477 U.S. as 248, 106 S. Ct. at 2510.[15] While "disputes over facts that might affect the outcome of a suit under the governing law will properly preclude the entry of summary judgement[,] [f]actual disputes that are irrelevant

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[12] Accord, e.g., Cobian v. New York, 2000 WL 1782744 at *7; Austin v. Ford Models, Inc., 2000WL 1752966 at *7; Johns-Davila v. City of New York, 2000WL 124992 at *4; Weber v. Parfums Givenchy, Inc., 49 F. Supp. 2d at 353; Douglas v. Victor Capital Group, 21 F. Supp. 2d at 388; Hernandez v. New York City Law Dep't, 1997 WL 27047 at *7.

[13] Accord, e.g., Cobian v. New York City, 2000 WL 1782744 at *7; Austin v. Ford Models, Inc., 2000WL 1752966 at *7; Johns-Davila v. City of New York, 2000 WL1725418 at *4; Carbonell v. Goord, 2000 WL 760751 at *5; Greenfield v. City of New York, 2000 WL 124992 at *4; Weber v. Parfums Givenchy, Inc., 49 F. Supp. 2d at 353; Douglas v. Victor Capital Group, 21 F. Supp. 2d at 387; Hernandez v. New York City Law Dep't, 1997 WL 27047 at *7.

[14] Accord, e.g., Cobian v. New York City, 2000 WL 1782744 at *7; Austin v. Ford Models, Inc., 2000 WL 1752966 at *7; Johns-Davila v. City of New York, 2000 WL 1725418 at *4; Carbonell v. Goord, 2000 WL 760751 at *5; Greenfield v. City of New York, 2000 WL 124992 at *4; Weber v. Parfums Givenchy, Inc., 49 F. Supp. 2d at 353; Douglas v. Victor Capital Group, 21 F. Supp. 2d 387.

[15] Accord, e.g., Cobian v. New York City, 2000 WL 1782744 at *7; Austin v. Ford Models, Inc., 2000 WL 760751 at *5; Greenfield v. City of New York, 2000 WL 124992 at *4; Weber v. Parfums Givency, Inc., 49 F. Supp. 2d at 353; Douglas v. Victor Capital Group, 21 F. Supp. 2d at 387.

or unnecessary will not be counted." Anderson v. Liberty Lobby, 477 U.S. at 248, 106 S. Ct. at 2510 (citations omitted).[16]

When a case turns on the intent of one party, as employment discrimination claims often do, a "trial court must be cautious about granting summary judgment." Gallo v. Prudential, 22 F.3d at 1224.[17] Because the employer rarely leaves direct evidence of its discriminatory intent, the Court must carefully comb the available evidence in search of circumstantial proof to undercut the employer's explanations for it's actions. E.g., Gallo v. Prudential, 22 F.3d at 1224.[18] "[S]ummary judgment may not be granted simply because the court believes that the plaintiff will be able to meet his or her burden of persuasion at trial.... There must either be a lack of evidence in support of the plaintiff's position... or the evidence must be so overwhelmingly tilted in one direction that any contrary finding would constitute clear error." Danzer v. Norden Sys., Inc., 151 F.3d 50, 54 (2d

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[16] See also, e.g., Knight v. United States Fire Inc. Co., 804 F.2d at 11-12; Cobian v. New York City, 2000WL 1782744 at *7; Austin v. Ford Models, Inc., 2000 WL 1752966 at *7; Johns-Davila v. City of New York, 2000WL 1725418 at *4; Carbonell v. Goord, 2000 WL 760751 at *5; Greenfield v. City of New York, 2000 WL 124992 at *4; Weber v. Parfums Givenchy, Inc., 49 F. Supp. 2d at 353; Douglas v. Victor Capital Group, 21 F. Supp. 2d at 387.

[17] Accord, e.g., Kerzer v. Kingly Mfg., 156 F.3d 396, 400 (2d Cir. 1998) ("in an employment discrimination case when, as here, the employer's intent is at issue, the trial court must be especially cautious about granting judgment"); McLee v. Chrysler Corp., 109 F.3d 130, 135 (2d Cir. 1997) ("caution must be exercised in granting summary judgment where motive is genuinely in issue"); Cardozo v. Healthfirst Inc., 98 Civ. 3050, 1999 WL 782546 at *1-2 (S.D.N.Y. Sept. 30, 1999); see also, e.g., Chambers v. TRM, 43 F.3d at 40; Cobian v. New York City, 2000 WL 1782744 at *8; Austin v. Ford Models, Inc., 2000 WL 1752966 at *7; Johns-Davila v. City of New York, 2000 WL 1725418 at *4; Weber v. Parfums Givenchy, Inc., 49 F. Supp. 2d at 353; Douglas v. Victor Capital Group, 21 F. Supp. 2d at 388; Hernandez v. New York City Law Dep't, 1997 WL 27047 at *7.

[18] See also, e.g., Cobian v. New York City, 2000 WL 1782744 at *8; Austin v. Ford Models, Inc., 2000 WL 1752966 at *7; Johns-Davila v. City of New York, 2000 WL 1725418 at *4; Weber v. Parfums Givenchy, Inc., 49 F. Supp. 2d at 353; Douglas v. Victor Capital Group, 21F. Supp. 2d at 388; Hernandez v. New York City Law Dep't 1997 WL 27047 at *7.

Cir. 1998).[19] Nonetheless, when an employer provides convincing evidence to explain its conduct and the plaintiff's argument consists of purely conclusory allegations discrimination, the Court may conclude that no material issue of fact exists and it may grant summary judgment to the employer. E.g., Budde v. H&K Distrib. Co., No. 99-9449, 216 f.3d 1071 (table), 2000 WL 900204 at *1 (2d Cir. June 29, 2000); Stern v. Trustees of Columbia Univ., 131 F. 3d 305, 312 (2d Cir. 1997); Meloff v. New York Life Ins. Co., 51 F.3d 372, 375 (2d Cir. 1995).[20] In other words, to defeat summary judgment, "the plaintiff's admissible evidence must show circumstances that would be sufficient to permit a rationale finder of fact to infer the defendant's employment decision was more likely than not based in whole or in part on discrimination." Stern v. Trustees of Columbia Univ., 131 F.3d at 312; see, e.g., Schnabel v. Abramson, 232 F.3d 83, 90-91 (2d Cir. 2000); Weinstock v. Columbia Univ., 224 F.3d at 42 (The question on summary judgment is "whether the evidence, taken as a whole , supports a sufficient rational inference of discrimination. To get to the jury, '[I]t is not enough... to disbelieve the employer; the factfinder must [also] believe the plaintiff's explanation of intentional discrimination."); Fischer v. Vassar College, 114 F.3d 1332, 1339 (2d Cir. 1997) (en banc), cert. denied, 118 S. Ct. 851 (1998); Van Zant v. KLM Royal Dutch Airlines, 80 F. 3d708, 714 (2d Cir. 1996) (plaintiff must "produce not simply 'some' evidence, but 'sufficient evidence to support a rational finding that the legitimate, nondiscriminatory reasons proffered by the employer were false, and that more likely

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[19] Accord, e.g., Cobian v. New York City, 2000 WL 1782744 at *7; Austin v. Ford Models, Inc., 2000 WL 760751 at *5; Greenfield v. City of New York, 2000 WL 1725418 at *4; Weber v. Parfums Givenchy, Inc., 49 F. Supp. 2d at 354.

[20] See also, e.g., Cobian v. New York City, 2000 WL 1782744 at *8; Austin v. Ford Models, Inc., 2000 WL 1752966 at *7; Johns-Davila v. City of New York, 2000 WL 1725418 at *4; Weber v. Parfums Givenchy, Inc., 49 F. Supp. 2d at 354; Douglas v. Victor Capital, 21 F. Supp. 2d at 388; Hernandez v. New York City Law Dep't, 1997 WL 27047 at *7 (S.D.N.Y. Feb. 22, 1996).

than not [discrimination] was the real reason for the discharge'").[21] Indeed, the Second Circuit "went out of [its] way to remind district courts that the 'impression that summary judgment is unavailable to defendants in discrimination cases is unsupportable.'" Weinstock v. Columbi Univ., 224 F.3d at 41.

II. THE ARMY'S MOTION TO AMEND IS GRANTED AND THE ANSWER IS DEEMED AMENDED TO ASSERT THE DEFENSE OF FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES WITH RESPECT TO ECONOMOU'S DISCRIMINATORY AND RETALIATORY REMOVAL CLAIMS

The Army has moved to amend its answer to assert Economou's failure to exhaust administrative remedies as an affirmative defense. (See, e.g., Dkt. No. 15: Notice of Motion; Dkt. No. 18 Army Br. At 10-12; Dkt. No. 20: Army Reply Br. at 1-3.)

This Court's Opinion in Turkenitz v. Metromotion discusses the law concering proposed amendments to pleadings after the close of discovery:

Rule 15(a) of the Federal Rules of Civil Procedure instructs that "leave [to amend] shall be freely given when justice so requires."

Analysis of any motion to amend starts with the Supreme Court's decision in Foman v. Davis, 371 U.S. 178, 83 S. Ct. 227 (1962):

> Rule 15(a) declares that leave to amend 'shall be freely given when justice so requires'; this mandate is to be heeded. If the underlying facts or circumstances relied upon by a plaintiff may

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[21] See also, e.g., Budde v. H&K Distrib. Co., 2000 WL 900204 at *1; Cobian v. New York City, 2000 WL 1782744 at *8; Austin v. Ford Models, Inc., 2000WL 1752966 at *7; Weber v. Parfums Givenchy, Inc., 49 F. Supp. 2d at 354; Hernandez v. New York City Law Dep't, 1997 WL 27047 at *7; Scaria v. Rubin, 94 Civ. 3333, 1996 WL 389250 at *5 (S.D.N.Y. July 11, 1996) (Peck, M.J.), aff'd, 117 F.3d 652, 654 (2d Cir. 1997).

> be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason- such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance amendment, futility of amendment, etc. - the leave sought should, as the rules require, be 'freely given.'

Id. at 182,83 S. Ct. at 230 (citations omitted).

> "' Prejudice to the opposing party if the motion is granted had been described as the most important reason for denying a motion to amend. Prejudice may be found, for example, when the amendment is sought after discovery has been closed.... Undue delay [and] bad faith... are other reasons for denying a motion to amend.'"

Berman v. Parco, 96 Civ. 0375, 1997WL 726414 at *22 [,986 F. Supp. 195] (S.D.N.Y. Nov. 19, 1997) (Peck, M.J.), quoting 1 M. Silverberg, Civil Practice in the Southern District of New York § 6.26, citing Richardson Greenshields Sec., Inc. v. Lau, 825 F.2d 647, 653 n.6 (2d Cir. 1987); State Teachers Retirement Bd. V. Fluor Corp., 654 F.2d 843, 856 (2d Cir. 1981); Bymoen v. Herzog, Heine, Geduld, Inc., 88 Civ. 1796, 1991 Wl 95387at *1-2 (S.D.N.Y.) May 28, 1991); Priestley v. American Airlines, Inc., 89 Civ. 8265, 1991 WL 64459 at *2 (S.D.N.Y. April 12, 1991) ("Insofar as the proposed claim is not predicated on facts learned after the pleading stage of the litigation, the resulting delay is not excusable... Undue prejudice warrants denial of leave to amend where the proposed claim will significantly increase the scope of discovery when the case is ready for trial.")

> "'Delay in seeking leave to amend a pleading is generally not, in and of itself, a reason to deny a

> motion to amend. However, the Court may deny a motion to amend when the movant knew or should have known of the facts upon which the movant offers no excuse for the delay... Leave t amend a complaint will generally be denied when the motion to amend is filed solely in an attempt to prevent the court form granting a motion to dismiss or for summary judgment, particularly when the new claim could have been raised earlier.'"

Berman v. Parco, 1997 WL 726414 at *22, quoting 1 M. Silverberg, Civil Practice in the Southern District of New York § 6.26, citing, inter alia, Bymoen v. Herzog, Heine, Geduld, Inc., 1991 WL 95387, and Priestly v. American Airlines Inc., 1991 WL 64459.

For further discussion of the issues of prejudice and undue delay, see generally 6 Wright, Miller & Kane, Federal Practice & Procedure: Civil 2d §§ 1487-88

> ("Perhaps the most important factor listed by the [Supreme] Court and the most frequent reason for denying leave to amend is that the opposing party will be prejudiced if the movant is permitted to alter his pleading... [A]lthough delay alone may not result in a denial of leave to amend, some courts have held that leave may be withheld if the moving party knew the facts on which the claim or defense sought to be added were based the time the original pleading was filed and there is no excuse for his failure to plead them.");

3 James Moore, Moore's Federal Practice § 15.15 [1]-[3] (3d ed. 1997).

Turkenitz v. Metromotion, Inc., 97 Civ. 2513, 1997 WL 773713 at *8-9 (S.D.N.Y. Dec. 12, 1997) (Peck, M.J.); accord, e.g., Schnepf v. Siegel, 98 Civ. 1255, 1998 WL 474132 at *1-2 (S.D.N.Y. July 11, 1998) (Peck, M.J.)

Here, on May 30, 2000 - less tan two weeks after the Army filed its answer on May 17, 2000 - defense counsel

informed Economou's attorney in open court that the Army was considering moving to dismiss on the grounds of failure to exhaust. (Dkt. No. 9 & Economou Ex. L: 5/30/00 Conf. Tr. At 4-5.) In addition, defense counsel raised the issue with Economou's counsel the day after the conference (see Army Ex. Y: 5/31/00 Letter from Reyes to Turco) and subsequently. (See Army Ex. Z: 8/11/00 Pre-Motion Letter; see also Army Ex. AA: 8/30/00 Letter from Turco to Reyes, quoted at fn. 5 above, indicating that the defense also was discussing in several conversations; Dkt. No. 14: Economou Br. at 8, conceding that issue was "mentioned informally and intermittently throughout this litigation.") Economou alleges a lack of good faith on the Army's part and claims that the Army 's "repeated failure to amend the answer, and/or make a dispositive motion on such grounds lulled plaintiff into the belief that such a defense - although mentioned informally and intermittently throughout this litigation - was nothing more than an idle threat." (Economou Br. at *.) As a result, Economou contends, he did not conduct discovery on the failure to exhaust administrative remedies defense and "should not now be unduly prejudiced and disadvantaged by the amendment of defendant's answer on the eve of summary judgment when discovery has been closed." (Id. at 8-9)

This Court finds no evidence of bad faith on the part of defense counsel. As for prejudice, Economou has not identified, nor can the Court surmise, what additional discovery would be needed concerning exhaustion. Economou not only had knowledge of the facts upon which the defense is based, but also, due to the defense's various communications, notice of the possibility -indeed probability - that the Army would assert the defense. See, e.g., Monahan v. New York City Dep't of Corrs., 214 F.3d 275, 284 (2d Cir.) (affirming district court's consideration of res judicata first raised in summary judgment motion where [d]efendants' untimely amendment did not unfairly surprise plaintiffs or impede the fair prosecution of their claims") (citing Han v. Mobil Oil Corp. , 73 F.3d 872, 877-878 (9th Cir.

1995) (fact that plaintiff had information giving rise to defense weighs against claim of prejudice from the delay)), cert. denied, No. 00-370, 2000WL 1337454 (Dec. 4, 2000); Block v. First Blood Assoc., 988 F.2d 344, 349-351 (2d Cir. 1993) (affirming district court's consideration of affirmative defense of statue of limitations first raised in summary judgment motion where plaintiffs did not show bad faith or prejudice); Stewart v. Chicago, No. 92 C 4919, 1994 WL 46672 at *1 (N.D. Ill. Feb. 14, 1994) (permitting amendment of answer to include affirmative defense first raised in summary judgment motion; "the fact that discovery had already closed is irrelevant because in this case the defense requires no additional discovery") ("'[A]bsent prejudice to the plaintiff, a defendant is deemed amended to assert the affirmative defense of failure to exhaust administrative remedies with respect to Economou's removal claim.

III. ECONOMOU DID NOT EXHAUST HIS DISCRIMINATORY AND RETALIATORY REMOVAL CLAIMS

A. The Legal Standard

Title VII, the ADEA and the Rehabilitation Act require a litigant to exhaust administrative remedies as a prerequisite to access to the federal courts. See, e.g., Boos v. Runyon, 201 F.3d 178, 181 (2d Cir. 2000) (Rehabilitation Act); Briones v. Runyon, 101 F.3d 287, 289 (2d Cir. 1996) (Title VII and ADEA).[22]

A federal employee seeking review of a major personnel action based on procedural errors and unlawful discrimination must exhaust his administrative remedies

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[22] An exception is that a federal employee who is claiming discrimination under the ADEA may proceed directly to federal court after providing the EEOC at least thirty days' notice of his intent to do so. See 29 U.S.C. § 633a(c), (d). However, where, as he is required to exhaust it. See, e.g., Briones v. Runyon, 101 F.3d at 289; Bornholdt v. Brady, 869 F. 2d 57, 62-64 (2d Cir. 1989).

either by filing a "mixed case complaint" with his agency's EEO office or b filing a "mixed case appeal" with the MSPB, but not both. See 29 C.F.R. § 1614.302(b);[23] see also, e.g., Downey v. Runyon, 160 F.3d 139, 141-142 (2d Cir. 1999)

> (" The Civil Service Reform Act ('CSRA') provides two paths toward redress for [federal] employees who allege that an adverse employment action was wholly or partly based on prohibited discrimination. CSRA provides that aggrieved employees may either bring a 'mixed complaint' before the [federal agency]'s Equal Employment Office ('EEO'), or a 'mixed appeal' before the MSPB.");

Bornholdt v. Brady, 869 F.2d at 62("EEOC regulations governing equal employment in the federal government... provide that a claim of discrimination or reprisal may be

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[23] Section 1614.302(b) provides:

> (b) Election. An aggrieved person may initially file a mixed case complaint with an agency pursuant to this part or an appeal on the same matter with the MSPB pursuant to 5 CFR 1201.151, but not both. An agency shall inform every employee who is the subject of an action that is appealable to the MSPB and who has either orally or in writing raised the issue of discrimination during the processing of the action of the right to file either a mixed case complaint with the agency or t file a mixed case appeal with the MSPB. The person shall be advised that he or she may not initially file both mixed case complaint and an appeal on the same matter and that whichever is filed first shall be considered an election to proceed in that forum. If a person files a mixed case complaint and an appeal on the same matter and that whichever is filed first shall be considered an election to proceed in that forum. If a person files a mixed case appeal with the MSPB instead of a mixed case complaint and the MSPB dismisses the appeal for jurisdictional reasons, the agency shall promptly notify the individual in writing of the right to contact an EEO counselor within 45 days of receipt of this notice and to file an EEO complaint, subject to § 1614.107. The date on which the person filed his or her appeal with MSPB shall be deemed to be the date of initial contact with the counselor.

pursued either before an equal opportunity agency created by the employing agency ('agency EEO') or before MSPB, but not before both simultaneously."); German v. Pena, 88F. Supp. 2d 222, 225 (S.D.N.Y. 2000); Shaishaa v. Walker, 98 Civ. 3281, 1999 WL 144517 at *2-4 (S.D.N.Y. March 16, 1999); Khalfani v. Secretary, Dep't of Veterans Affairs, Nos. 93-CV-5374, 94-CV-0644,94-CV-5720, 1998WL 765128 at *5, *6 (E.D.N.Y. July 21, 1998).

> "The MSPB and the EEO each have jurisdiction to hear 'mixed case' claims, or those actions by aggrieved [federal] employees challenging termination allegedly based on both discriminatory and non-discriminatory but impermissible conduct... Once an employee has chosen the agency in which he wishes to adjudicate his claims, he is required to bring all claims relevant to his discharge in that proceeding."

German v. Pena, 88 F. Supp. 2d at 225.

"[W]hichever is filed first shall be considered an election to proceed in that forum" and thereafter, the employee is precluded from availing himself of the other option. 29 C.F.R. § 1614.302(b); Bornholdt v. Brady, 869 F.2d at 62 ("The claimant is deemed to have elected to proceed in whichever forum he has filed first."); German v. Pena, 88 F. Supp. 2d at 225; Shaishaa v. Walker, 1999 WL 144517 at *4; Khalfani v. Secretary Dep't of Veterans Affairs, 1998 WL 765128 at *5 ("Once employees have chose one remedy, they are thereafter precluded from availing themselves of the other.").

Once an employee chooses to file a MSPB "mixed case appeal," he must exhaust the remedy completely before seeking redress in federal court. See, e.g., McAdams v. Reno, 64 F.3d 1137, 1142 (8th Cir. 1995); Bornholdt v. Brady, 869 F.2d at 63-64 ; German v. Pena, 88 F. Supp. 2d at 225. Should the employee voluntarily withdraw his MSPB complaint prior to a final decision on the merits, he will be precluded from raising those claims in a subsequent discrimination

action in federal court. See, e.g., Wrenn v. Secretary, Dep't of Veterans affairs, 918 F. 2d 1073, 1078 (2d Cir. 1990) ("[a]llowing a plaintiff to abandon the administrative remedies he has initiated [under the ADEA] would tend to frustrate the ability of the agency to deal with complaints"), cert, denied, 499 U.S. 877, 111 S. Ct. 1625 (1991); Bornholdt v. Brady, 869 F.2d at 64 (plaintiff "having commenced the [MSPB] review of his reprisal claim but having aborted a final administrative decision on the merits, he cannot now obtain a judicial resolution of the merits of that clai"); Doe v. Odili Tech., Inc., No. 3:96 CV1957, 1997 WL 317316 at *3 (D. Conn. 1997) ("A request to withdraw charges 'whether mistaken or otherwise,' when granted, removes jurisdiction from the court.").[24]

B. Economou Failed to Exhaust His Administrative Remedies on His Removal Claims

On January 14, 1998, Economou filed an appeal with the MSPB challenging his removal from the Army Corps. (Economou Ex. D: MSPB Appeal; see also Economou& Army 56.1 Stmts. ¶ 1.) Economou claimed that (i) the Army Corps committed procedural errors in connection with his December 19, 1997 termination; and (ii) his removal violated Title VII because he had been "discriminated and retaliated on an ongoing basis" and "the agency retaliated against [him] for having engaged in protected EEO activity." (MSPB Appeal ¶¶ 27, 30(b), 31(b), 32(a); see Economou & Army 56.1 Stmts. ¶¶ 3-4.) Thus, because Economou raised both discrimination claims and procedural errors in his MSPB

[24] See also, e.g. Baber v. Runyon, 97 Civ. 4798, 1998 WL 912065 at *5 (S.D.N.Y. Dec. 30, 1998) (citing Rivera v. United States Postal Service, 830 F.2d 1037, 1039 (9th Cir. 1987) ("To withdraw is to abandon one's claim, to fail to exhaust one's remedies."), cert. denied, 486 U.S. 1009, 108 S. Ct. 1737 (1988)); Tsai v. Helfer, 940 F. Supp. 597, 602 (S.D.N.Y. 1996); Brown v. City of New York, 869 F. Supp. 158, 170 (S.D.N.Y. 1994); Lawrence v. Baker, No. 85-CV-434, 1991 WL 148286 at *18 n. 47 (N.D.N.Y. July 25, 1991), aff'd, 963 F.2d 1522 (2d Cir.), cert. denied, 506 U.S.889, 113 S. Ct. 254 (1992).

appeal, it was a "mixed case appeal." See, e.g., 29 C.F.R. §1614.302(a)(2).[25]

The Army argues that because Economou did not file a formal complaint with the Army's EEO office concerning his removal until March 5, 1998, i.e., after he had filed his January 14, 1998 MSPB mixed case appeal, his filing with the MSPB constituted an election to proceed in that forum with respect to all aspects of his removal claim (including his claim of discrimination and retaliation) and he was required to exhaust the MSPB appeal process before seeking redress in this Court concerning his removal. (Army Br. at 12-13; Army Reply Br. at 4.) The Army further contends that by voluntarily withdrawing his MSPB mixed case appeal on April 1, 1998, "Economou abandoned his termination claims in the MSPB mixed case appeal process and he cannot now pursue those claims in this Court." (Army Br. at 15.)

Economou disputes the Army's contention that he did not file a formal complaint with the EEO concerning his removal until after he had already filed his MSPB mixed case appeal:

> Plaintiff did file a formal complaint with the U.S. Corps. of Engineers Equal Employment Opportunity (EEO) Office concerning his proposed removal from service on October 4, 1997; and later January 5 [sic], 1998, he amended the formal EEO complaint to include the allegations of actual removal- effective December 19, 1997. ..., plaintiff appealed EEO's final decision [and] [u]pon appeal to the EEOC, EEOC reinstated the complaint which is the basis of the present case before the Court.

(Economou 56.1 Stmt. ¶ 4.)

Economou also argued that the "MSPB improperly invoked jurisdiction to dismiss the case with prejudice"

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[25] "A mixed case appeal is an appeal filed with the MSPB that alleges that an appealable agency action was effected, in whole or in part, because of discrimination on the basis of race, color, religion, sex, national origin, handicap or age." 29 C.F.R. § 1614.302(a)(2).

because "[b]eginning in early February, 1998, through April 1, 1998, plaintiff repeatedly urged MSPB Judge Farnes not to consider his appeal [and] stated numerous times that he wanted to pursue his retaliatory removal complaint through EEO process." (Economou 56.1 Stmt. ¶ 5.) In sum, Economou argues that his "[March 5, 1998] EEO formal filing, prior to the April 1 MSPB Order asserting jurisdiction - in addition to the pending EEOC appeal - precluded the MSPB from asserting jurisdiction." (Economou Br. at 13.)

Economou's reliance on his March 5, 1998 formal agency EEO complaint is misplaced because it was filed after his January 14, 1998 MSPB appeal. As a matter of law, as between a formal EEO complaint and an MSPB appeal, "[w]hichever remedy is filed first shall be considered an election to proceed in that forum" and thereafter the plaintiff is precluded from availing himself of the other forum. 29 C.F.R. § 1614.302(b); see cases cited at pages 35-37 above. Thus, the fact that Economou "wanted to pursue his retaliatory removal complaint through the EEO process" (Economou 56.1 Stmt. ¶) is irrelevant, as is the fact that it was not until April 1, 1998 that the MSPB announced it had jurisdiction.

Economou's reliance on his October 4, 1997 formal EEO complaint is also misplaced. "If, following [an EEO] complaint on a proposal, the complainant files an appeal with the MSPB on the subsequent Army decision resulting from that proposal, the complainant files an appeal with the MSPB on the subsequent Army decision resulting form that proposal." 32 C.F.R. § 588.46(f)(2) (1997-98);accord, e.g., Mills v. Pena, Agency No. 92-0206, 1994 WL 741561 at *3 (E.E.O.C. Oct. 12, 1994). Thus, Economou's filing of the prior October 1997 formal EEO complaint with respect to his proposed removal, rather than his actual removal, did not divest the MSPB of jurisdiction over his mixed case regarding his subsequent removal. See, e.g., Yartzoff v. EPA, 34 M.S.P.R. 105, 107 (M.S.P.B. 1987) ("Unlike the filing of an EEO complaint with respect to a removal action, the filing of an EEO complaint with respect to a proposal to remove does

not affect the [MSPB]'s jurisdiction, unless there is a clear showing that the parties intended the complaint to include the removal action."); Jordan-Berry v. Department of Interior, 32 M.S.P.R. 412, 414 (M.S.P.B. 1987) ("appellant's action in initially filing a formal discrimination complaint [about proposed removal] did not divest the [MSPB] of jurisdiction" over appeal from removal); Coleman v. Department of Treasury, 22 M.S.P.R. 519, 520-21 (M.S.P.B. 1984).

To the extent Economou relies on his purported January 1998 amendment of the October 4, 1997 EEO complaint to include allegations of actual removal (see Economou 56.1 Stmt. ¶ 4; Economou Br. at 10-11), Economou admitted in his MSPB appeal form that his EEO complaint regarding his removal was "in the precomplaint stage" (Economou Ex. D: MSPB Appeal ¶ 32(b(.) See. e.g., Proud v. United States, 872 F.2d 1066, 1068 (D.C. Cir. 1989) (initiation of pre-complaint proceedings insufficient to constitute an election); German v. Pena, 88 F. Supp. 2d at 225 ("Regardless of the precomplaint procedures plaintiff undertook, it is uncontested that he filed his EEO complaint one month after he filed his MSPB complaint. By filing formal complaint with the MSPB first, plaintiff elected to pursue all of his claims for wrongful termination in that forum.")

Nonetheless, Economou asserts by affidavit that:

> On January 7, 1998, I telephoned Joanne Close, EEO Manager of the North Atlantic Division indicating that I was forwarding a request for an EEO counselor to conduct a new inquiry into a retaliatory charge I was filing stemming from my removal form my position effective December 19, 1997. The following day, Ms. Close received my complaint which identified to primary issues , the removal and the alleged failure to provide reasonable accommodation for my disability- Carpal Tunnel Syndrome.

See, e.g., Economou 9/14/00

In the absence of evidence to the contrary, the Court assumes Economou is referring to his January 8, 1998 EEO request for counseling, Army Ex. P. That request , however, makes no reference to and gives no indication that it should be considered an amendment to the October 4, 1997 complaint, or in any other way indicates that it is a formal EEO complaint. (See Army Ex. P, quoted at pages 16-17 above).[26]

In sum, having filed a mixed case with the MSPB on January 14, 1998 before filing a formal agency EEO complaint concerning his actual removal , and having abandoned the MSPB appeal process on April 1, 1998 (Economou Ex. K: 4/1/98 MSPB Initial Decision),[27] Economou's claims are barred from court review. See, e.g., Bornholdt v. Brady,

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[26] To the extent that Economou might be referring to some other document, he has not provided the Court with a copy or detailed description of the document, and neither the EEO or the EEOC considered any such submission to be an amendment of the October 4, 1997 complaint. On February 19, 1998, the EEO dismissed Economou's proposed removal claim on the basis that it would be investigated in a subsequently filed complaint regarding Economou's actual removal and the EEOC affirmed that decision.

[27] Economou disputes defendant's assertion in its Rule 56.1 Stmt. (¶5) that "On April 1, 1998, Economou voluntarily withdrew from further consideration his mixed case appeal pending before the MSPB." (See Economou 56.1 Stmt. ¶ 4.) However, Economou offers no evidence to support his denial and refute the evidence in the record that "[d]uring a telephonic conference held on April 1, 19998, [Economou] informed [the MSPB] he was withdrawing his appeal." (Economou Ex. K: 4/1/98 MSPB Initial Decision at 1.) See, e.g., Podell v. Citicorp Diners Club, Inc., 112F. 3d 98, 101 (2d Cir. 1997) ("The litigant opposing summary judgment may not rest upon mere conclusory allegations or denials, but must bring forward some affirmative indication that his version of relevant events is not fanciful.") (internal quotations omitted); Bellsouth Telecomm. v. W.R. Grace & Co., 77 F.3d 603, 615 (2d Cir. 1996) ("'[A]n adverse party may not rest upon mere conclusory allegations or denials. The party opposing the motion [for summary judgment] must set forth "concrete particulars" ... It is not sufficient merely t assert a conclusion without supplying supporting arguments or facts....'") (alterations in original).

869 F. 2d 57, 64 (2d Cir. 1989); see also cases cited at pages 35-37 above.

C. Economou Is Not Entitled to Equitable Relief From he Administrative Exhaustion Requirement

Economou argues that "[u]nder the rather unusual circumstances of this case," he in entitled to equitable relief from the administrative exhaustion requirement. (See Dkt. No. 14: Economou Br. at 13-15.)

As the Supreme Court stated in Title VII context in Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 96, 111 S. Ct. 453, 457 (1990), "[f]ederal courts have typically extended equitable relief only sparingly." Normally, equitable relief is available only when the plaintiff's failure to comply with administrative requirements "is someone else's fault." Dillard v. Runyon, 928 F. Supp. 1316, 1325 (S.D.N.Y. 1996), aff'd mem., 108 F.3d 169 (2d Cir. 1997).[28]

Equitable relief is particularly inappropriate where the plaintiff was represented by counsel during the relevant period. See Keyse v. California Tex. Oil Corp., 590 F.2d 45, 47 (2d Cir. 1978) (per curiam); Smith v. American President Airlines Ltd., 571 F.2d 102, 109-10 (2d Cir. 1978) (once claimant consults an attorney he has "access to a means of acquiring knowledge of his rights and responsibilities"); Lynk v. Henderson, 98 Civ. 2086, 2000 WL178859 at *7 (S.D.N.Y. Feb. 15, 2000); McCain v. Eaton Corp., CV 88-3309, 1990 WL 127583 at *4 (E.D.N.Y. Aug. 29, 1990) Cole v. CBS,

[28] Accord, e.g., Gannon v. Apfel, No. CV 67-3920, 1999 WL 1288953 at *5 (E.D.N.Y. Nov. 5,1999); Cordeo v. Heyman, 97 Civ. 0453, 1998 WL 730558 at *3 (S.D.N.Y. Oct. 19, 1998); see, e.g., South v. Saab Cars USA, Inc., 28 F.3d 9,11 (2d Cir. 1994) (equitable relief available, for example,"where affirmative misconduct on the part of the defendant may have lulled plaintiff into inaction").

Inc., 634 F. Supp. 1558, 1564 (S.D.N.Y. 1986).[29]

Economou contends that he was "initially misled by the Army as to proper administrative course his complaint should take." (Economou Br. at 12.) He argues that relying on information contained in the December 19, 1997 Notice of Decision informing him of his removal, he "decided that he should file with MSPB in order to best protect his right to appellate review, as well as amend his formal complaint with the EEO to include his actual removal." (Id. at 10.) Economou cites the following language from the notice in support of his argument:

> You may appeal under statutory appellate procedures by filing notice of appeal... to the Merit Systems Protection Board. If you appeal, the Merit Systems Protection Board will review the decision and all findings in connection with the removal.... If you believe this action is discriminatory, ... you have the right to seek assistance form the [EEO].

(Id., quoting Army Ex. B: 2/19/97 Notice of Decision.)

While the December 19, 1997 Notice of Decision may not have described the interplay between the EEO and the MSPB, it was not misleading and does not warrant equitable relief. See, e.g., Long v. Frank, 22 F.3d 54, 59 (2d Cir. 1994) (equitable relief not warranted where "[t]he ambiguity of the EEOC notice does not... amount to affirmative misconduct on the government's part aimed at causing [plaintiff] to forgo his legal rights."), cert. denied, 513 U.S. 1128, 115 S. Ct. 938 (1995); Martin v. Reno, 96 Civ. 7646, 1999 WL 527932 at *9 (S.D.N.Y. July 22, 1999) ("The opposing party is not required to guide a plaintiff through the complexities of litigation, he only must refrain from affirmative misconduct

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[29] See also e.g., Irwin v. Dep't of Veterans Affairs, 498 U.S. at 96, 111 S. Ct. at 457-58 (equitable tolling not warranted where plaintiff's attorney was out of office when EEOC notice arrived); South v. Saab Cars USA, Inc., 28 F.3d at 12 ("lack of due diligence on the part of plaintiff's attorney is insufficient to justify" equitable relief).

that denies a plaintiff ... legal rights. The responsibility to enforce those rights is the plaintiff's. "); Charlotten v. May Dep't Stores Co., 97 Civ. 8962, 1998 WL 635547 at *3 (S.D.N.Y. Sept. 16, 1998) (Equitable relief "is inapposite in this context since there is no evidence that any government official or defendant affirmatively the plaintiff."); Dillard v. Runyon, 928 F. Supp at 1326. This particularly so given that Economou was represented by his current counsel at least as early as August 29, 1997, long before he filed his MSPB appeal. (See Reyes Suppl. Decl. Ex. A: 8/29/97 Memorandum, indicating that Allan Serrins would be representing Economou at hearing concerning proposed removal.

Accordingly, because Economou did not pursue his discrimination claims concerning his termination before the MSPB, and equitable relief from the administrative exhaustion requirement is not warranted, the Court will not consider Economou's discriminatory and retaliatory termination claims.

IV. THE INVESTIGATIONS ABOUT WHICH ECNOMOU COMPLAINS ARE NOT "ADVERSE EMPLOYMENT ACTIONS"

To establish a prima facie case of national origin, age, or disability discrimination, or retaliation, with respect to the investigation about which he complains, Economou must show, inter alia, that those investigations constituted adverse employment actions within the meaning of the discrimination statutes. See, e.g., Cobian v. New York City, 99 Civ. 10533, 2000 WL 1782744 at *15, *16 (S.D.N.Y. Dec. 6, 2000) (Peck, M.J.), citing inter alia, Reeves v. Sanderson Plumbing Prods, Inc, 120 S. Ct. 2097, 2106 (2000); Weinstock v. Columbia Univ., 224 F.3d 33, 42 (2d Cir. 2000); Tomka v. Seiler Corp., 66 F.3d 1295, 1308 (2d Cir. 1995); Gallagher v. Delaney, 139 F.3d 3338, 349 (2d Cir. 1998).

As the Second Circuit has observed, while adverse employment action is not defined solely in terms of job

termination or reduction in wages and benefits, "' not every unpleasant matter short of [discharge or demotion] creates a cause action.' " Wanamaker v. Columbian Rope Co., 108 F.3d 462, 466 (2d Cir. 1997) (brackets in original); accord, e.g., Smart v. Ball State Univ., 89 F.3d 437, 441 (7th Cir. 1996) ("While adverse employment actions extend beyond readily quantifiable losses, not everything that makes an employee unhappy is an actionable adverse action" under Title VII.); Spohn v. West , 00 Civ. 0735, 2000 WL 1459981 at *5 (S.D.N.Y. Oct. 2, 2000) (Peck, M.J.). Rather, a plaintiff must establish that he has suffered a " ' materially adverse change in terms and conditions of employment.' " Torres v. Pisano, 116 F.3d 625, 640 (2d Cir.), cert. denied, 522 U.S. 997, 118 S. Ct. 563 (1997); see also, e.g., Spohn v. West, 2000 WL 1459981 at *5.

Economou complains of the following: he was investigated with respect to his involvement in the summer hire program (see Army Ex. Q: Economou Dep. at 53-54); he was the subject of a "lot of secret investigations that [he] was never privy to: (id. at 50-53); Col. Thomas scrutinized his comings and goings (id. at 54-55); and he was made to conduct investigations of his own projects (id. at 44-46). See pages 9-11 above. Economou, however, has come forward with no evidence that he was adversely affected by any of these investigations - indeed, he admitted that he was not disciplined in any way as a result of the investigation into the summer hire program (id. at 53-54) and that no action was taken against him as a result of Col. Thomas's scrutiny of his whereabouts (id. at 57).[30]

Courts in this Circuit have held that investigations alone are not adverse employment actions. See, e.g., Yerdon v. Henry, 91 F.3d 370, 378 (2d Cir. 1996) (employee cannot be adversely affected by charges of wrongdoing in the

[30] The Court disregards as conclusory the assertion in Economou's Rule 56.1 Statement that "All of the investigations of which the Complainant complained resulted directly in plaintiff's removal." (See Economou 56.1 Stmt. ¶ 8.)

workplace unless the charges are decided against him); Cahill v. O'Donnell, 75 F. Supp. 2d 264, 274 (S.D.N.Y. 1999) (charge of gender discrimination against plaintiff and resulting investigation did not constitute adverse employment action where plaintiff did not produce evidence that charges were improperly brought and charges did not result in disciplinary action or other job consequences); Garcia v. West, 98 Civ. 3905, 1999 WL 782563 at *4 (S.D.N.Y. Sept. 30, 1999) (plaintiff failed to establish prima facie of retaliation with respect to drug diversion investigation where "no disciplinary or other type of action was ever taken against Plaintiff as a result of the investigation"); NiCastro v. Runyon, 60 F. Supp. 2d 181, 186 (S.D.N.Y. 1999) ("many of the actions complained of by plaintiff, such as scrutiny from his supervisors that he deemed excessive [and] requiring documentation for sick leave... do not constitute 'adverse employment actions' and so cannot be the basis of any claim of Title VII retaliation"); Boylan v. Arruda, 42 F. Supp. 2d 352, 357 (S.D.N.Y. 1999) ("simply undergoing an investigation is not sufficient to constitute 'adverse employment action' ").[31]

Accordingly, the Army is granted summary judgment on Economou's claims with respect to allegedly discriminatory

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[31] Moreover, Economou's conclusory assertions that he was "maligned" as a result of the investigation into the summer hire program (Economou Dep. at 53-54) and "ignore[d]" as a result of Col. Thomas's alleged "secret investigations" (id. at 57) do not convert those investigations into adverse employment actions. See, e.g., Sinopoli v. Regula, No. 97-7229, 125 F.3d 844 (table), 1997 WL 624987 at *2 (2d Cir. Oct. 9, 1997) (Plaintiff's "statement that he was 'often' ridiculed is conclusory, and is not otherwise supported in the record. It thus may not be taken into account on summary judgment."); Cobian v. New York City, 2000WL 1782744 at *19 & n. 40 (conclusory allegations of discrimination insufficient to defeat summary judgment) (citing cases).

and retaliatory investigations.[32]

V. ECONOMOU WAS OFFERED REASONABLE ACCOMMODATION FOR HIS DISABILITY

To establish a prima facie case of discrimination based on an employer's disability under the Rehabilitation Act (or the Americans with Disabilities Act), "an employee bears the burden of demonstrating that: (1) he was an individual who has a disability' within the meaning of the statute; (2) the employer had notice of his disability; (3) he could perform the essential functions of he job with reasonable accommodation; and (4) the employer refused to make such accommodation." Parker v. Columbia Pictures Indus., 204 F.3d 326, 332 (2d Cir. 2000); see, e.g., Stone v. City of Mount Vernon, 118 F.3d 92, 96-97 (2d Cir. 1999); Lyons v. Legal Aid Soc'y, 68 F.3d 1512, 1515 (2d Cir. 1995).[33]

The Army concedes that Economou is an individual with a disability within the meaning of the Rehabilitation Act, that it had notice of that disability, and that Economou, with reasonable accommodation, was otherwise qualified to perform essential functions of his position. (See Army Br. at 19 n.7.)

As for Economou's claim that he was denied reasonable accommodation by Col. York in 1994, it is undisputed that

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[32] In his amended complaint, Economou alleges that he was subjected to investigations "designed by Col. Thomas and M.G. Hunter to create an abusive, hostile and stressful environment for plaintiff." (Am. Compl. ¶ 13.) Any hostile work environment claim, however, is deemed abandoned since Economou has not addressed the claim anywhere in his opposition papers . See, e.g., Blumental v. Sea Hotel Co., LLC, 99 Civ. 4881, 2000 WL 1349249 at *4 (S.D.N.Y. Sept. 19, 2000) (Peck, M.J.); Douglas v. Victor Capital Group, 21 F. Supp. 2d 379, 393 (S.D.N.Y. 1998) (Stein, D.J. & Peck, M.J.) (& case cited therein). Indeed, the Court notes that Economou's opposition brief does not address the Army's motion for summary judgment on Economou's investigations claim at all.

[33] See also, e.g., Wheeler v. Corporation Counsel of N.Y.C., 5184, 2000 WL 1760947 at *10 (S.D.N.Y. 2000); Wilson v. Consolidated Edison Co., 96 Civ. 7546, 2000 WL 335733 at *8 (S.D.N.Y. March 30, 2000).

Economou was placed on extended paid medical leave from June 9, 1994 to June 25, 1995 apparently as a result of an unrelated on-the-job injury. (see 9/22/00 Deptula Aff. ¶¶ 1-2.) It is also undisputed that Economou never requested any further accommodation when he returned from that leave, until September 1997. (9/22/00 Deptula Aff. ¶ 3; Army Ex. Q: Economou Dep. at 78-79, 116-17.) Because Economou never requested any accommodation on his return, the Army entitled to summary judgment on Economou's Rehabilitation Act claim with respect to the 1994 events. See cases cited at pages 52-53 below.[34]

As for Economou's claim that he was denied reasonable accommodation by Col. Thomas in 1997, the only evidence in the record of any requests for accommodation during Thomas's tenure is the series of requests for leave which Economou made beginning in September 1997. (See, e.g., Army Exs. H at 4-6, K, M; see also discussion at pages 4-8 above.) The undisputed evidence shows that within two hours of Economou's initial Application for Sick Leave on September 8, 1997 for the period September 2 through October 8, 1997, Economou was informed that the Army Corps would accommodate him by: (1) making a secretary available to him to type or write, (2) purchasing word recognition software which would enable him to "speak" to his computer which would then write for him, or (3) providing him with a tape recorder on which he could

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[34] In any event, two additional and independent reasons exist for dismissing Economou's Rehabilitation Act claim with respect to the events of 1994. First, Economou's alleged request and the Army's alleged denial of accommodation in 1994 when Col. York was Economou's supervisor is outside the scope of this action since the amended complaint alleges only that Col. Thomas denied Economou reasonable accommodation. (Economou Ex. A: Am. Compl. ¶ 14.) Second, Economou has not alleged, and there is no indication in the record, that he has exhausted his administrative remedies with respect to any reasonable accommodation claim arising in 1994. See, e.g., 29 C.F.R. § 1614.105(a) (1) & regulations cited at pages 54-55 below (requiring federal employee to, inter alia, consult with an agency EEO counselor within forty-five days of an alleged discriminatory act).

record notes which would then be transcribed by his secretary. (See Army ex. H at 1: Lock Mem. ¶¶ 6, 9.)

These accommodations were reasonable under the circumstances because they would have enabled Economou to "refrain from excessive computer use" and would have eliminated the need for Economou "to use his hands for computer operations," as prohibited by Dr. Holzer and Dr. Roditis.[35] See, e.g., 42 U.S.C. § 12111(9) ('The term 'reasonable accommodation' may include... job restructuring, ... acquisition or modification of equipment or devices, ... the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities."); 29 C.F.R. § 1630.2(o)(ii) (examples of reasonable accommodation include "[m]odifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable a qualified individual with a disability to perform the essential functions of that position"); Wernick v. Federal Reserve Bank, 91 F.3d 379, 384 (2d Cir. 1996) (providing employee with ergonomic furniture constituted reasonable accommodation). "There is no provision requiring the employer to take account of the disabled individual's preference in choosing the means of accommodation." Fink v. New York City Dep't of Personnel, 855 F. Supp. 68, 72 (S.D.N.Y. 1994), aff'd, 53 F.3d 565 (2d Cir. 1995); see also, e.g., Gile v. United Airlines, Inc., 95 F.3d 492, 499 (7th Cir. 1996) ("An employer is not obligated to provide an employee the accommodation he requests or prefers, the employer need only provide some reasonable accommodation of her choice.") Katz v. Metropolitan Life Ins. Co., 95 Civ. 10075, 1998 WL 132945 at *5 (S.D.N.Y. March 20, 1998); Kemer v. Johnson, 900 F. Supp. 677, 686 (S.D.N.Y. 1995) ("Once a reasonable accommodation has been made, a defendant has fulfilled its obligation to make an

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[35] Indeed, they included the accommodation that Economou had requested in 1994: a voice recognition program for his computer. (Army Ex. Q: Economou Dep. at 78.)

accommodation."), aff'd mem., 101 F.3d 683 (2d Cir.), cert. denied. 519 U.S. 985, 117 S. Ct. 441 (1996); Nelson v. Ryan, 860 F. Supp. 76, 81 (W.D.N.Y. 1994) ("The ultimate inquiry is not whether a plaintiff's actual request for accommodation is allowed, but whether the accommodation offered to the plaintiff was, in fact, reasonable.").

When Economou subsequently submitted a doctor's note stating that Economou was "totally incapacitated" and could not work at all due to medication (see Army Ex. !: 9/8/97 Letter from Dr. Roditis), it was reasonable for the Army to request further documentation to determine whether Economou's absence from work would be justified. See e.g., Jackan v. New York State Dep't of Labor, 205 F.3d562, 566 (2d Cir.) (federal regulations interpreting the Rehabilitation Act envision an "interactive process" by which employers and employees work together to assess whether employee's disability can be reasonably accommodated) (citing 29 C.F.R. § 1630.2(o)(3) ("This process should identify the precise limitations resulting from the disability and the potential reasonable accommodations that could overcome those limitations.")), cert. denied, 121 S. Ct. 314 (2000); Shelton v. General Elec. Aerospace Div., No. 95-CV-112, , 1998 WL 187413 at *9 (N.D.N.Y. April 14, 1998) (Pooler, D.J.) (an "employer may require an employee to provide documentation of her need for an accommodation if the need is not obvious") (citing 29 C.F.R. pt. 1630.9, app. At 362); Sidor v. Reno, 95 Civ. 9588, 1997 WL 582846 at *6 (S.D.N.Y. Sept. 19, 1997) ("Once... a request for accommodation is made, 'the responsibility for fashioning a reasonable accommodation is shared between the employee and the employer.'"). Economou, however, never submitted any further information, but instead continued to submit requests for sick leaves accompanied by notes from Dr. Holzer with the same cursory explanation that "[b]ecause Mr. Economou is under medication, he is not allowed to be physically in the work place for the duration indicated above." (See Army Ex. J; Army Ex. K at 3; Army Ex. M at 2).

As the Seventh Circuit stated in an ADA case:

> Once an employer knows of an employee's disability and the employee has requested reasonable accommodations, the ADA and its implementing regulations require that the parties engage in an interactive process to determine what precise accommodations are necessary. In this case, the interactive process broke down... Liability for failure to provide reasonable accommodations ensues only where the employer bears responsibility for the breakdown. But where, as here, the employer does not obstruct the process, but instead makes reasonable efforts both to communicate with the employee and provide accommodations based on information it possessed, ADA liability simply does not follow.

Beck v. University of Wisc. Bd. Of Regents, 75 F.3d 1130, 1137 (7th Cir. 1996); see also, e.g., Templeton v. Neodata Servs. Inc., 162 F.3d 617, 619 (10th Cir. 1998) ("the employee's failure to provide medical information necessary to the interactive process precludes her from claiming that the employer violated the ADA by failing to provide reasonable accommodation"); Steffes v. Stephan Co., 144 F.3d 1070, 1073 (7th Cir. 1998) ("Because [plaintiff] failed to holdup her end of the interactive process by clarifying the extent of her medical restrictions, [her employer] cannot be held liable for failing reasonable accommodations.").

VI. ECONOMOU EXHAUSTED HIS DENIAL OF TRAINING CLAIM; SUMMARY JUDGMENT IS DENIED

The Army has moved for summary judgment on Economou's denial of training claim solely on the ground to exhaust administrative remedies. (See Army Br. at 30; Army Reply Br. at 10.10.)

As discussed in Point III.A of this Opinion, a plaintiff claiming discrimination under Title VII, the ADEA and the Rehabilitation Act generally, must exhaust administrative

remedies before bringing suit in federal court. See, e.g., Briones v. Runyon, 101 F.3d 287, 289 (2d Cir. 1996), and cases cited in Point III.A above.

EEOC regulations require an aggrieved federal employee to first consult with an agency EEO counselor within forty-five days of alleged discriminatory act. See 29 C.F.R. § 1614.105(a)(1). The employee must then file an EEO complaint with "the agency that allegedly discriminated against the complainant." Id. § 1614.106. Within ninety days of that agency's final decision, or after 180 days have passed from the filing of the complaint if no final decision has been rendered, the complainant may file suit in federal court. See id. § 1614.407; see also, e.g., 42 U.S.C. § 2000e-16(c); (Title VII); 29 U.S.C. § 2000e-16 apply to federal employees seeking relief under the Rehabilitation Act); 29 C.F.R. 1614.407; Brown v. General Servs. Admin., 425 U.S. 820, 832, 96 S. Ct. 1961, 1967 (1976) ("[T]he complainant may file a civil action if, after 180 days from the filing of the charge..., the agency... has not taken final action."); Boos v. Runyon, 201 F.3d 178, 181 (2d Cir. 2000); Wrenn v. Secretary, Dep't of Veterans Affairs, 918 F.2d 1073, 1077 (2d Cir. 1990), cert. denied, 499 U.S. 977, 111 S. Ct. 1625 (1991); Taylor v. Henderson, 99 F. Supp. 2d 434, 437 (S.D.N.Y. 2000) (Peck, M.J.) ("A government employee can sue his employing agency for discrimination in federal court within 90 days of final agency action or after 180 days have passed from the filing of the formal EEO complaint without a final agency decision.").

In its brief, the Army - referencing the two August 11, 1997 EEO complaints and the March 5, 1998 EEO complaints - argued that "it is undisputed that Economou did not raise the claim that he was denied training opportunities in any of the three EEO complaints which form the basis of this lawsuit." (Army Br. at 27, citing Army 56.1 Stmt. ¶ 22, citing Am. Compl. Exs. A-C.) In response, Economou has submitted a copy of a February 2, 1997 formal EEO complaint alleging, inter alia, that in retaliation for his prior EEO activity, he was denied training given to similarly

situated employees. (See Economou Ex. P: 2/2/97 EEO Compl.; see also Economou had cited his February 2, 1997 EEO complaint in the "Exhaustion of Administrative Remedies" section of his amended complaint, he was not required to do so.[36]

Accordingly, because at the time Economou filed this lawsuit, more than 180 days had passed since Economou filed his February 2, 1997 formal agency EEO complaint with respect to his denial of training/retaliation claim, that claim has been exhausted and defendant's summary judgment motion with respect to that claim is denied.

Since the Army has not moved for summary judgment with respect to this claim on the merits or any other basis, the claim will proceed to trial. The Join Pretrial Order is due thirty days from the date of this Opinion.

VII. ECONOMOU HAS FAILED TO SHOW THAT THE ARMY'S PROFFERED LEGITIMATE NONDISRCRIMINATION REASON FOR DENYING HIM A 1997 PERFORMANCE EVALUATION WAS A PRETEXT FOR RETALIATION

Economou claims that Col. Thomas retaliated against him for his EEO activity by denying him a 1996-1997 performance rating and the monetary award that would have resulted form a positive evaluation. (See Economou Ex. A: Am. Compl. ¶ 16; Economou Br. at 16-18.) The Army has moved for summary judgment on the grounds that Economou has not established a prima facie case with respect to the denial, but that even if Economou has established a prima facie case, the Army has articulated a

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[36] As for defense counsel's argument that Economou should be precluded from relying on the February 2, 1997 EEO complaint because it was not produced during discovery (see Army Reply Br. at 1; Reyes Suppl. Decl. ¶ 2), the Army has not established that the document was within the scope of any of its document requests. If the Army had done so, the Court would have excluded the document and granted the Army's summary judgment motion on this claim.

legitimate nondiscriminatory and nonpretextual reason for withholding the evaluation. (Army Br. at 23-27; Army Reply Br. at 8-9.)

A. Applicable Legal Standards

Retaliation claims under the discrimination statutes are governed by the McDonnell Douglas burden-shifting analysis. See, e.g., Sotolongo v. New York City Transit Auth., No. 99-9195, 216 F.3d 1073 (table), 2000WL 777958 at *2-3 (2d Cir. June 15, 2000) (retaliation claim under Title VII and ADEA); Sutherland v. New York State Dep't of Law, No. 99-9086, 216 F.3d 1073 (table), 2000 WL 730413 at *3 (2d Cir. June 2, 2000) (Rehabilitation Act Standards are same as ADA standards); Silk v. City of Chicago, 194 F.3d 788,798 & n.7, 799-803 (7th Cir. 1999) (Rehabilitation Act); Adeniji v. Administration for Children's Servs., 43 F. Supp. 2d 407, 428 (S.D.N.Y.) (Wood, D.J. & Peck, M.J.) (Title VII retaliation) (citing Gallagher v. Delaney, 139 F.3d 338, 349 (2d Cir. 1998)), aff'd mem., 201 F.3d 430 (2d Cir. 1999).

Under the McDonnell Douglas burden-shifting analysis, the plaintiff has the burden at the outset of "proving by the preponderance of the evidence a prima facie case of discrimination." Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 252-53, 101 S. Ct. 1089, 1093, (1981); see, e.g., Reeves v. Sanderson Plumbing, 120 S. Ct. 2097, 2106 (2000); O'Connor v. Consolidated Coin Caterers Corp., 517 U.S. 502, 507, 113 S. Ct. 1307, 1309 (1996); St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 507,113 S. Ct. 2742, 2746-47 (1993); McDonnell Douglas v. Green, 411 U.S. at 802, 93 S. Ct. at 1824. [37] Establishment of a prima facie case "in effect creates

[37] See also, e.g., Schnabel v. Abramson, 232 F.3d 83, 87 (2d Cir. 2000); Austin v. Ford Models, Inc., 149 F.3d 148, 152 (2d Cir. 1998); Chambers v. TRM Copy Ctrs. Corp., 43 F.3d 29, 37 (2d Cir. 1994); Cobian v. New York City, 99 CIV. 10533, 2000 WL 1782744 at *11 (S.D.N.Y. Dec. 6, 2000) (Peck, M.J.); Austin v. Ford Models, Inc., 98 Civ. 3731, 2000 WL 1752966 at *8...

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a presumption that the employer unlawfully discriminated against the employee.' " St. Mary's v. Hicks, 509 U.S. at 506, 113 S. Ct. at 2747 (quoting Texas Dep't of Community Affairs v. Burdine, 450 U.S. at 254, 101 S. Ct. at 1094).[38]

Once a plaintiff claiming employment discrimination has established a prima facie case, the burden shifts to the defendant to rebut the presumption of discrimination by articulating a legitimate, non-discriminatory reason for its employment decision. E.g., Reeves v. Sanderson Plumbing, 120 S. Ct. at 2106; O'Connor v. Consolidated Coin, 517 U.S. at 310; 116 S. Ct. at 1309; St. Mary's v. Hicks, 509 U.S. at 506-507, 113 S. Ct. at 2747; Texas v. Burdine, 450 U.S. at 253-254, 101 S. Ct. at 1093-94; McDonnell Douglas v. Green, 411 U. S. at 802, 93. S. Ct. at 1824.[39] The burden on the defendant at this phase is one of production rather than persuasion. E.g., Reeves v. Sanderson Plumbing, 120 S. Ct. at 2106; St. Mary's

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...(S.D.N.Y. Nov. 29, 2000) (Peck, M.J.); Weber v. Parfums Givenchy, Inc., 49 F. Supp. 2d 343, 354 (S.D.N.Y. 1999) (Wood, D.J. & Peck, M.J.); Lediju v. New York City Dep't of Sanitation , 173 F.R.D. 105, 113-14 (S.D.N.Y. 1997) (Leisure, D.J. & Peck M.J.); Hernandez v. New York City Law Dep't, 1997 WL 27047 at *12; Burger v. Litton, 91 Civ. 0918, 1996 421449 at *8 (S.D.N.Y. April 25, 1996) (Peck, M.J.), report & rec. adopted, 1996 WL 609421 (S.D.N.Y. Oct. 22, 1996) (Knapp, D.J.).

[38] See also, e.g., Scaria v. Rubin, 117 F.3d 652, 654 (2d Cir. 1997); Fischer v. Vassar College, 114 F.3d 1332, 1335 (2d Cir. 1997) (en banc), cert. denied, 522 U.S. 1075, 118 S. Ct.. 851 (1998); Cobian v. New York City, 2000 WL 1782744 at *11; Austin v. Ford Models, Inc., 2000 WL 1752966 at *8; Weber v. Parfums Givenchy, Inc., 49 F. Supp. 2d at 355; Hernandez v. New York City Law Dep't, 1997 WL 27047 at *12; Burger v. Litton, 1996 WL 421449 at *8.

[39] See also, e.g., Schnabel v. Abramson, 232 F.3d at 87; Weinstock v. Columbia Univ., 224 F.3d 33, 42 (2d Cir. 2000); Austin v. Ford Models, Inc., 149 F.3d at 152; Stein v. Turstees of Columbia Univ., 131 F.3d 305, 312 (2d Cir. 1997); Scaria v. Rubin, 117 F.3d at 654; Fischer v. Vassar College, 104 F.3d at 1335; Chambers v. TRM, 43 F.3d at 38; Cobian v. New York City, 2000 WL 1782744 at *11; Austin v. Ford Models, Inc., 2000 WL 1752966 at *8; Weber v. Parfums Givenchy , Inc., 49 F. Supp 2d at 356; Hernandez v. New York City Law Dep't, 1997 WL 27047 at *12; Burger v. Litton, 1996 *12; Burger v. Litton, 1996 WL 421449 at *8.

v. Hicks, 509 U.S. at 507, 113 S. Ct. at 2747; Texas v. Burdine, 450 U.S. at 257, 101 S. Ct. at 1096.[40]

"Any legitimate, non-discriminatory reason will rebut the presumption triggered by the prima facie case." Fisher v. Vassar College, 114 F.3d at 1335-36; accord, e.g., Weber v. Parfums Givenchy, Inc., 49 F. Supp. 2d at 356. "' It is important to note ... that although the McDonnell Douglas presumption shifts the burden of production to the defendant, "[t]he ulimate burdern of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." ' "Fisher v. Vassar College, 114 F.3d at 1335 (quoting St. Mary's v. Hicks, 509 U.S. at 507, 113 S. Ct. at 2747); accord, e.g., Reeves v. Sanderson Plumbing, 120 S. Ct. at 2106; Cobian v. New York City, 2000 WL 1782744 at *11; Austin v. Ford Models, Inc., 2000 WL 1752966 at *9; Weber v. Parfums Givenchy, Inc., 49 F. Supp. 2d at 3562.

If the defendant articulates a non-discriminatory reason, the McDonnell Douglas burden-shifting framework drops out of the picture. E.g., Reeves v. Sanderson Plumbing, 120 S. Ct. at 2106; St. Mary's v. Hicks, 509 U.S. at 510, 113 S. Ct. at 2749; Texas v. Burdine, 450 U.S. at 253, 101 S. Ct. at 1093-94.[41]

> "Moreover, although the presumption of discrimination 'drops out of the picture' once the defendant meets its burden of production, ... the trier of fact may still consider the evidence establishing the plaintiff's prima facie case 'and inferences properly drawn therefrom ... on the

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[40] See also, e.g., Austin v. Ford Models, Inc., 149 F.3d at 153; Scaria v. Rubin, 117 F.3d at 654; Fisher v. Vassar College, 114 F.3d at 1335; Cobian v. New York City, 2000 WL 1782744 at *11; Austin v. Ford Models, Inc., 2000 WL 1752966 at *8; Weber v. Parfums Givenchy, Inc., 49 F. Supp. 2d at 356; Hernandez v. New York City Law Dep't, 1997 WL 27047 at *12; Burger v. Litton, 1996 WL 421449 at *8.

[41] See also, e.g., Weinstock v. Columbia Univ., 224 F.3d at 654; Fisher v. Vassar College, 114 F.3d at 1336; Cobian v. New York City, 2000 WL 1782744 at *12; Austin v. Ford Models, Inc., 2000 WL 1752966 at *9; Weber v. Parfums Givenchy, Inc., 49 F. Supp. at 356.

issue of whether the defendant's explanation is pretextural.' "

Reeves v. Sanderson Plumbing, 120 S. Ct. at 2106 (quoting Texas v. Burdine, 450 U.S. at 255 n.10, 101 S. Ct. at 1095 n.10); accord, e.g., Cobian v. New York City, 2000 WL 1782744 at *12; Austin v. Ford Models, Inc., 2000 WL 1752966 at *9.

Just last term, the Supreme Court clarified the standard at this stage of the McDonnell Douglas analysis:

> [I]n St. Mary's Honor Center, ... we held that the factfinder's rejection of the employer's legitimate, nondiscriminatory reason for its action does not compel judgment for the plaintiff. The ultimate question is whether the employer intentionally discriminated, and proof that "the employer's proffered reason is unpersuasive, or even obviously contrived, does not necessarily establish that the plaintiff's proffered reason ... is correct." In other words, "[i]t is not enough... to disbelieve the employer; the factfinder must believe the plaintiff's explanation of intentional discrimination."
>
> In reaching this conclusion, however, we reasoned that it is permissible for the trier of fact to infer the ultimate fact of discrimination from the falsity of the employer's explanation...
>
> Proof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive. In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose. Such an inference is consistent with the general principle of evidence law that the fact finder is entitled to consider a party's dishonesty about a material fact as "affirmative evidence of guilt." Moreover, once the employer's

justification has been eliminated, discrimination may well be the most likely alternative explanation, especially since the employer is in the best position to put forth the actual reason for its decision. Thus, a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated.

This is not to say that such a showing by the plaintiff will always be adequate to sustain a jury's finding of liability. Certainly there will be instances where, although the plaintiff has established a prima facie case and set forth sufficient evidence to reject the defendant's explanation, no rational factfinder could conclude that the acton was discriminatory. For instance, an employer would be entitled to judgment as a matter of law if the record conclusively revealed some other, nondiscriminatory reason for the employer's decision, or if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred. To hold otherwise would be effectively to insulate an entire category of employment discrimination cases form review under Rule 50 [or Rule 56], and we have reiterated that trial courts should not " ' treat discrimination differently from other ultimate questions of fact.

Whether judgment as a matter of law [or summary judgment] is appropriate in any particular case will depend on a number of factors. Those include the strength of the plaintiff's prima facie case, the probative value of the proof that the employer's explanation is false, and any other evidence that supports the

> employer's case and that properly may be considered on a motion for judgment as a matter of law.

Reeves v. Sanderson Plumbing, 120 S. Ct. at 21089-09 (emphasis added & citations omitted); accord e.g., Cobian v. New York City, 2000 WL 1782744 at *12-13; Austin v. Ford Models, Inc., 2000 WL 1752966 at *9-10.

After Reeves, the Second Circuit has made clear that merely proving a prima facie case and disproving the employer's explanation for its conduct at the third step of the McDonnell Douglas analysis will not preclude summary judgment in all cases; rather, a case-by-case analysis is necessary:

> In examining the impact of Reeves on our precedents, we conclude that Reeves prevents courts from imposing a per se rule requiring in all instances that an ADEA claimant offer more than a prima facie case and evidence of pretext... But the converse is not true; following Reeves, we decline to hold that no ADEA defendant may succeed on a summary judgment motion so long as the plaintiff has established a prima facie case and presented evidence of pretext. Rather, we hold that the Supreme Court's decision in Reeves clearly mandates a case-by-case approach, with a court examining the entire record to determine whether the plaintiff could satisfy his "ultimate burden of persuading the trier of fact the defendant intentionally discriminated against the plaintiff."

Schnabel v. Abramson, 232 F.3d at 90 (emphasis added); accord, e.g., James v. New York Racing Ass'n, No. 007040, 2000 WL 1752908 at *4-6 (2d Cir. Nov. 29, 2000).[42]

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[42] See also, e.g., Weinstock v. Columbia Univ., 224 F.3d at 42 ("In short, the question becomes whether the evidence, taken as a whole, supports a sufficient rational inference of discrimination."); Cobian v. New York City,

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Indeed, the Second Circuit and the District decisions within the Circuit continue to grant summary judgment to defendants in appropriate cases at the final McDonnell Douglas step, even after Reeves.[43]

The Court therefore turns to the McDonnell Douglas analysis of Economou's performance evaluation claim and evidence.

B. Application of the Legal Standards to Economou's Performance Evaluation Claim

Because the denial of his 1996-97 performance rating in the fall of 1997 followed closely on the heels of his August 11, 1997 EEO complaint against Col. Thomas, the Court assumes without deciding that Economou has established a prima facie case with respect to the denial of his performance rating. See, e.g., Quinn v. Green Tree Credit Corp., 159 F.3d 759, 769 (2d Cir. 1998) (causal connection satisfied where adverse action took place shortly after protected activity); see also, e.g., Christian v. Henderson, 98 Civ. 3467, 2000 WL 534518 at *5, 8 (S.D.N.Y. May 3, 2000)

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2000 WL 1752966 at *10; Connell v. Consolidated Edison Co., 109 F. Supp. 2d 202, 207-08 (S.D.N.Y. 2000) (Chin, D.J.) ("The key is whether there is sufficient evidence in the record - whether it consists of just prima facie case and proof of pretext alone or those items together with additional evidence - to support an inference of discrimination.").

[43] E.g., James v. New York Racing Ass'n, 2000WL 1752908 at *7; Cobian v. New York City, 2000 WL 1782744 at *13; Austin v. Ford Models, Inc., 2000WL 1752966 at *12-15; Trezza v. Dilenschneider Group, 99 Civ. 0185, 2000 WL 1682759 at *8-11 (S.D.N.Y. Nov. 9, 2000); Chudnovsky v. Prudential Sec., Inc., 98 Civ. 7753, 2000 WL 1576876 at *8 (S.D.N.Y. Oct. 23, 2000); Cousins v. Howell Corp., 113 F. Supp. 2d 62, 268-69 (D. Conn. 2000); Ekwegbalu v. Central Parking Sys., 97 Civ. 9477, 2000 WL 1371335 at *3-4 (S.D.N.Y. Sept. 22, 2000); Connell v. Consolidated Edison Co., 109 F. Supp. at 208-11; Lenhoff v. Getty, 97 Civ. 9458, 2000 WL 977900 at *5-6 (S.D.N.Y. July 17, 2000); Campbell v. Alliance Nat'l Inc., 107 F. Supp. 2d 234, 251 & n. 12 (S.D.N.Y. 2000).

(casual connection satisfied where, at time of adverse action, plaintiff had several outstanding EEO complaints).

Under McDonnell Douglas, the burden shifts to the Army to produce evidence of non-discriminatory reasons for its actions. See cases cited at pages 58-59 above. Col. Thomas testified that he was advised by the Chief of Human Resources that a rating was not required because the removal process for Economou had already begun by the end of the rating period. (See Economou Ex. Q: Thomas Resp. to Interrog. No. 22 (f); Army Ex. T: Thomas Dep. at 37-38; Army 56.1 Stmt. ¶¶ 19-20.) The Army points to Army Regulation 690-400, Total Army Performance Evaluation System, Chapter 4302, Appendix A.

(See Army 56.1 Stmt. ¶ 20; Army Br. at 26; Army Ex. S.) Section 1.c.(2)(d) Section 1.c.(2)(d) of that Appendix provides that a performance rating may be delayed where the "Ratee is in a notice period for proposed disciplinary or adverse action based upon an offense that, if sustained, will have direct impact on the performance appraisal." (Army Ex. S: Army Reg. 690-400, Total Performance Evaluation System, Chapter 4302, Appendix A § 1.c.(2)(d).) The undisputed evidence is that Economou's 1997 evaluation ordinarily would have been prepared in late 1997 (see, e.g., Army Ex. T: Thomas Dep. at 40; see also, e.g., Economou Br. at 17), after the August 26, 1997 Notice of Proposed Removal had been issued, and that the charges contained in the Notice pertained to conduct committed during the rating period (see, e.g., Thomas Dep. at 40; Army Ex. C: 8/26/97 Notice of Proposed Removal).

Economou attempts to rebut the defendant's nonretaliatory reason in two ways. First, Economou asserts that "Col. Thomas' failure to complete Form 7222-1 in the beginning of the rating period is evidence that he never had intentions of rating plaintiff." (Economou 56.1 Stmt. ¶ 18.) However, the only record cite Economou provides in support of his assertion is to "Exhibit S" which contains the regulations governing the Total Army Performance System and there is no further mention of this argument in

Economou's brief. Although Economou does not provide pincites, section 1-5 of the TAPES describes DA Form 7222-1 as the form on which "written performance plans which document expectations" are to be recorded. Col. Thomas alleged in response to Economou's Interrogatory No. 22(d) that he did not prepare a 7222-1 Form for the 1996-97 rating period because "Mr. Economou's rater would have been responsible for the preparation of the form" (Economou Ex. Q: Thomas Resp. to Interrog. No. 22 (d)), and at his deposition, Col. Thomas testified that Economou's rater was Col. Hough (see Army Ex. T: Thomas Dep. at 36-37). As Economou does not point to any evidence to refute Col. Thomas's proffered reason for not filling out the 7222-1 form, the fact that Col. Thomas did not fill out the form will not defeat summary judgment.

Second, Economou argues that there exist genuine issues of material fact as to whether Economou's investigation for fraud was in itself retaliatory and discriminatory. (See Economou Br. at 18.) However, Economou has not cited evidence in support of this argument. (See id.) Economou does, however, cite a list of chiefs in the New York District who where not being investigated for fraud in support of his assertion in his Rule 56.1 Statement that "Plaintiff was treated differently than other similarly situated employees in that no other employees were investigated for fraud as a pretext for removal." (See Economou 56.1 Stmt. ¶ 16, citing Economou Ex. R.) In the absence of evidence that employees in that no other employees were investigated for fraud as a pretext for removal." (See Economou 56.1 Stmt. ¶ 16, citing Economou Ex. R.) In the absence of evidence that employees who engaged in conduct similar to Economou's - i.e., submitting apparently fraudulent travel vouchers - were not investigated. See, e.g., Graham v. Long Island R.R., 220 F.3d 34, 39 (2d Cir. 2000) ("the plaintiff must show [he] seeks to compare [him]self") (quoting Shumway v. United Parcel Serv., Inc., 118 F.3d 60, 64 (2d Cir. 1997)); Norville v. Staten Island Univ. Hosp., 196 F.3d 89, 95 (2d Cir. 1999); Alston v. New York City Transit Auth., 97 Civ. 1080, 1999 WL 540442

at *6 (S.D.N.Y. July 26, 1999) ("[Plaintiff]'s inability to demonstrate that other employees who engaged in conduct similar to that of [plaintiff]'s were treated more favorably that he was counsels in favor of granting defendant's motion."), aff'd mem., 208 F.3d 202 (2d Cir. 2000); Tramble v. Columbia Univ., 97 Civ. 1271, 1999 WL 61826 at *6 (S.D.N.Y. Feb. 10, 2000); Ponticelli v. Zurich American American Ins. Group,16 F. Supp. 2d 414, 427 (S.D.N.Y. 1998) (granting summary judgment where female plaintiff alleging gender discrimination "has not pointed to a single similarly situated male who, for example, was believed to have forged signatures..., who received different treatment").

Accordingly, the Army is granted summary judgment on Economou's evaluation claim.

CONCLUSION

For the reasons set forth above, the Army's summary judgment motion is granted on Economou's; discriminatory and retaliatory removal claim, discriminatory and retaliatory investigations claim, reasonable accommodation claim, and denial of performance rating claim. The Army's summary judgment motion is denied on Economou's failure to train claim.